SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 69

DR. EDWARD K. BARSKY

Appellant,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, petitioner-appellant submits this statement showing that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or order of the Court of Appeals of the State of New York made in this cause on February 26, 1953.

Dates of Judgment Sought to Be Reviewed and of This Appeal

The judgment and order of the Court of Appeals of the State of New York sought to be reviewed, affirmed the order of the Appellate Division of the Supreme Court for the Third Judicial Department. The majority and dissenting opinions of the Judges of the Court of Appeals, and the judgment and order of that Court, were filed on February 26, 1953. The remittitur of the Court of Appeals was issued

to the Supreme Court of the State of New York, Albany County on February 27, 1953. Application for re-argument was made on March 5, 1953 and was denied on April 16, 1953, and at the same time the Court of Appeals granted Appellant's motion for a stay pending an appeal to the Supreme Court of the United States, and to amend the remittitur by the inclusion of a certificate that federal, constitutional questions had been raised and passed upon.

The application for appeal to the United States Supreme Court was presented to and signed by the Chief Judge of the Court of Appeals of the State of New York on May 7, 1953.

The Court of Appeals of the State of New York is the state court of last resort. Its judgment in this case is both final in form and substance and disposes of all of the elements of the controversy in the Court below.

Opinion Below

The opinion of the Court of Appeals of the State of New York in this cause is reported in 305 N.Y. 89. A copy of the opinion is attached hereto as Exhibit "A". The opinion of the Appellate Division of the Supreme Court of the State of New York for the Third Department in this cause is reported in 279 App. Div. 1117 and a copy is attached as Exhibit "B". Said opinion Exhibit "B", states it was based upon the authority of a decision of the said Appellate Division in the cause heard prior to this cause, and reported in 279 App. Div. 447. A copy of the opinion in the prior cause is attached as Exhibit "C". The opinion of the Appellee's Committee on Discipline is contained in the printed Record on Appeal (fols. 111-193).

The Statutory Provision Sustaining Jurisdiction

This cause was instituted to review the Appellee's suspension of the Appellant's medical license and permission

to practice medicine in New York State, for six months. The Appellee acted under authority purportedly conferred by Sections 6514 and 6515 of the New York State Education Law. The Appellant drew into question the validity of the statutes on the ground that they were repugnant to the Constitution of the United States on their face and as construed and as applied. The decision of the highest Court of the State of New York in this cause was in favor of the challenged statutes.

The jurisdiction of the Supreme Court of the United States to review the judgment and order by direct appeal is conferred by Title 28 of the United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court: *Hamilton* v. *Regents of the University of California*, 293 U.S. 245; *Senn* v. *Tile Layers Union*, 301 U.S. 468; *Lovell* v. *City of Griffin*, 303 U.S. 444; *People ex rel. McCollum* v. *Board of Education*, 333 U.S. 203; *Winters* v. *N.Y.*, 333 U.S. 507.

The Statutes Involved

The validity of the following statutes is involved: New York State Education Law, Sections 6514 and 6515. The statutes permit revocation of a physician's medical license, upon his conviction "in a court of competent jurisdiction, either within or without this state, of a crime". The statutes are set out verbatim in Exhibit "D".

Appellant contends and contended in this case, that the statutes referred to are on their face, and as construed and applied, repugnant to the Constitution of the United States. The decision rendered by the Court below, was in favor of their validity.

Statement as to the Nature of the Case *

Appellant is a physician and surgeon of some thirty years of the highest standing in his profession and in his community. On September 28, 1951 the Appellee suspended Appellant's medical license for six months by reason of his conviction in 1947 in the United States District Court, for the District of Columbia, for failure to produce before the House Un-American Activities Committee, subpoenaed records of a charitable organization known as the Joint Anti-Fascist Refugee Committee, of which Appellant occupied the unsalaried post of chairman.

Appellant, and other members of the executive board of the organization, among whom were a number of physicians, were indicted on two counts; one for conspiracy to fail to produce the records, and the other for failure to produce them. On the trial, the then attorneys for the Appellant and the others indicted, delimited themselves to the constitutional issues involved. As the dissenting opinion noted:

> "The Regents' Committee on Discipline—here comprised of two lawyers and a physician—is the body set up by statute to conduct hearings for the Board of Regents (Education Law, Sec. 211; Sec. 6514, subd. 4; Sec. 6517). It summarized 'the issues litigated and not litigated at the criminal trial' in this way: 'There was no adjudication with respect to the actual facts regarding the Refugee Committee and its operations. There was no adjudication with respect to the motives or reasons of the defendants in failing to comply with the subpoenas. There was adjudication that the constitutional challenges and the defense of lack of custody or

* The designation "S.M.p." refers to the pages of the typewritten stenographic minutes of the hearings held before the Appellee. By stipulation, printing of these minutes was dispensed with; they were handed up to the Court of Appeals together with all exhibits introduced at the hearings.

The designation "fols." refers to folios of the printed record.

control of the records were legally insufficient.' The Committee on Discipline noted further that the federal court had directed judgment of acquittal on a conspiracy count in the indictment." Exhibit A pages 59-60.

Appellant was acquitted of conspiracy not to produce the ks. Yet he was convicted of failure to produce the books which admittedly he did not have possession, of which Attorney General of New York acknowledged the execue secretary "was the legal custodian" and of which the cutive secretary, who had possession, was also later conted. Appellant's conviction was affirmed, one judge disting (*Barsky, et al.* v. *U. S.*, 167 F. 2d 241); certiorari s denied in June, 1948 (334 U. S. 843) and rehearing was ied two years later with a notation that two of the Juses were of the opinion that the petition should be granted 39 U. S. 971). Appellant was sentenced to six months. actually served five months in prison, thus suffering at same time an actual suspension of his medical license those five months.

Following Appellant's conviction, the Appellee in 1948, mmenced proceedings against Appellant to revoke his dical license under Sections 6514 and 6515 of the New rk State Education Law, on the ground that he had been nvicted of a crime. Appellant interposed an answer in ich he detailed claimed violations of the Federal Contution, and set forth defenses on the merits. A copy of charges and answer are contained in the aforementioned ewritten stenographic minutes at pages 4-28. On the ring before the Appellee's Sub-Committee of the Medi- Grievance Committee, Appellant offered evidence on merits to show that although he had been found guilty the narrowly limited criminal trial, he was not actually lty, and that no moral turpitude was involved. As the pellee's Committee on Discipline later stated: "Re-

spondent's (Appellant's here) motives and reasons for failing to produce the subpoenaed records were not material in the criminal trial that resulted in his conviction. They are material here" (fol. 48).

The evidence adduced before the Appellee, was uncontradicted. In 1942, the Joint Anti-Fascist Refugee Committee was formed to aid some 500,000 refugees who fled from Spain after the Franco victory. Documentary evidence showed these men, women and children were homeless, ill, undernourished, some without arms or legs, some blind and some having to be carried over the Pyrenees into France. Dr. Joy, the Director of the Unitarian Service Committee which distributed the funds for the Refugee Committee in France, testified that "of the Spanish Republican refugees concerned, only a small proportion were Communists" (fol. 185). The organization raised over a million dollars from 1942 to 1947, besides clothing and similar relief in kind. It distributed this money and relief to other organizations like the Quakers, the Unitarians, the Christian Board of Missions, and the Committee in Mexico, all of whom handled the actual disbursing of the funds and the relief in kind, and who used the money to build and maintain hospitals in France and Mexico, a convalescent home, a rest home for tubercular and undernourished children, and to provide medical aid, food, clothing and shelter. As the Appellee's Committee on Discipline wrote: "there were no strings attached to the distribution of such relief, but that it was to go to Spanish Republican refugees regardless of creed or shade of political opinion" (fol. 184).

The organization had a paid, executive secretary who, the Attorney General of New York acknowledged, "was the legal custodian" of its books (S. M. p. 370). Appellant served as chairman, without remuneration, and within the limited time his active practice permitted (S. M. p. 222).

organization was concededly licensed by and rendered orts to the President's War Relief Control Board. It eived complete tax exemption as a charitable organiza- from the Treasury Department. The money it sent the kers for relief in Africa, for example, was cleared ough and approved by the State Department and the leral Reserve Bank. Some of the relief obtained by the anization was distributed in conjunction with the United ions Relief and Rehabilitation Association. Its relief recognized by the French Government. In some cases as called upon for aid by the U. S. State Department. wspapers like the New York Times and the Herald bune carried editorials praising the organization and uesting funds for it (S. M. p. 296). Eminent persons m all walks of life and all professions, supported its rts (S. M. p. 220-1; 280; 297-8). The Attorney General New York conceded that at the time "the various gov- ments throughout the world had ceased relations with Franco regime" (S. M. p. 219).

On about December 1, 1945 the House Un-American Activ- s Committee, without any notice to the organization, empted to have the War Relief Control Board revoke the anization's license. The request was refused. The use Committee then served a subpoena upon the execu- secretary for the production of records including the nes of the contributors to and recipients of the charity of organization. It served a similar subpoena upon Appel- t although he did not have such custody. The executive rd voted to refuse to turn over its books to Appellant; one their reasons was that the secretary who had possession d already been served. The Appellant and the organiza- n were then faced with a problem of trust; having been rusted with these names, they were fearful that reveal- them would cause financial and other harm to the con-

tributors, and would cause imprisonment and execution of those families of the contributors and recipients who were still in Spain. That their fears were reasonable was borne out later by the fact that even before the aforementioned indictments, testimony given by one of the board members of the organization before the House Committee, found its way to a newspaper in Spain. Had the names of the contributors and recipients been included in that testimony, their families in Spain would have been imprisoned and executed.

Appellee's Committee on Discipline wrote:

> "The Attorney-General formally conceded that respondent 'was advised by his counsel that the subpoenas were unconstitutionally issued and that he was not legally required to respond to them'; that the opinion on the constitutional question held by respondent's counsel 'was held by many lawyers and some jurists'; that there were 'expressions in some legal journals' that the subpoenas were illegal; and that such an opinion was held by one of the Judges of the Court of Appeals before which the case came up on appeal. Later the Attorney-General stated:
>
> 'I will concede that the advice given to Dr. Barsky by the attorney, Mr. Wolf, was not an opinion which he held alone; nor was it at that time an unreasonable construction of law on his part';
>
> 'I have already conceded that the lawyer's opinion was based on what to him seemed to be reasonable, and what to many others seemed to be reasonable.'
>
> Second, as bearing on the motives of respondent and the others of the Refugee Committee in being unwilling to respond to the subpoenas if there were legal justification for not doing so, the Attorney-General made the following concession:
>
> '• • • I will concede that there were numbers of people, including editorial writers, including authors, doctors, lawyers who looked with disfavor upon the

conduct of the House Committee on Un-American Activities at the time.'

"The Attorney-General conceded further that Congressmen were included among the 'people of prominence' who held such views, and that there were Congressmen who at that time made speeches 'against the activities of (the Congressional Committee) against its procedure and otherwise.'

"The principal reasons given by respondent and the others of the Executive Board for refusing informal requests of the Congressional Committee for an examination of the Refugee Committee's records, and for failing to produce those records in response to the subpoenas, may be summarized as follows: They had been advised by counsel that the subpoenas were invalid. They asserted that they were engaged in relief activity only, and denied that any of their activities fell within the scope of the matters into which (under the Resolution of the House of Representatives) the Congressional Committee was authorized to inquire. These facts, they asserted, could be ascertained by examination of the reports which the Refugee Committee had filed with the President's War Relief Control Board. With regard to the scope of the Congressional Committee's authority, they referred further to a statement of the Congressional Committee as to its 'regular duty of collecting information on the operations and activities of fund-raising organizations in this country, whose purpose is in part to conduct activities abroad,' and denied that this was among the subjects committed to the Congressional Committee by the House of Representatives. They expressed a fear that to make public some of the information contained in their records, specifically the names of Spanish Republican exiles who participated in the Refugee Committee's activities or were the beneficiaries of its relief, would endanger the lives of the families of those persons still in Spain. Based in part on a newspaper statement emanating from the Congressional Committee to the effect that its Chief Counsel had on December

1, 1945, asked the President's War Relief Control Board to cancel the Refugee Committee's license, they asserted that the Congressional Committee had evidenced hostility and prejudgment. Finally, they asserted they were challenging the authority of the Congressional Committee and the validity of its subpoenas so that those questions might, if necessary be determined by the courts.

"If these views were honestly held and these assertions honestly made, they would sufficiently explain the refusal by respondent and the others to produce the subpoenaed records, that being the only method by which the legal objections to the Congressional Committee's course could be judicially determined, and the traditional method by which such legal questions are raised (Sinclair v. United States, supra). The question is, then, whether there is any basis in the record for concluding that these views and assertions were not honestly held and made. Our examination of the record, discloses no such basis.

"A conclusion that these views and assertions were not honestly held and made could, of course, be based on evidence, if there were any, that, for example, the statements regarding the Refugee Committee's operations were false in that, in addition to its authenticated relief activities, it had actually engaged in some subversive or un-American propaganda activity. Once that were shown, the inference would be legitimate that the legal position adopted was adopted merely as a cover in an attempt to thwart investigation; and a legal course otherwise colorless would take on a color of defiance of Congressional authority. But there is no such evidentiary showing. It may be that some of those connected with the Refugee Committee, perhaps respondent among them, had Communist affiliations, and it may be that through them the Refugee Committee was led into some unspecified subversive activity; but there is no legal evidence to support these hypotheses, and conjecture cannot take the place of evidence." (fols. 171–82).

* * * * *

"There is, for example, the testimony of Dr. Charles R. Joy of Boston, who had been Executive Director of the Unitarian Service Committee at a time when very large funds raised by the Refugee Committee were distributed for it in France and elsewhere by the Unitarian Service Committee, that there were no strings attached to the distribution of such relief, but that it was to go to Spanish Republican refugees regardless of creed or shade of political opinion. Dr. Joy testified also that, of the Spanish Republican refugees concerned, only a small proportion were Communists. There is evidence also in Respondent's Exhibit D, a circular issued in connection with the raising of money for the Dr. Walter B. Cannon Memorial Hospital Fund, that many eminent doctors and others of wholly unimpeachable reputation were actively connected with that project of the Refugee Committee's. Further, there is evidence that the Refugee Committee's reports to the President's War Relief Control Board did, in fact, as the Refugee Committee claimed, go into considerable detail as to its fund-raising and relief activities.

"There is ground also for conjecture, favorable to respondent's (appellant here) position, as to how the situation eventuating in the criminal trial may have arisen. It appears from testimony in the criminal trial by Congressman Wood, Chairman of the Congressional Committee, that the Congressional Committee had received complaints about the Refugee Committee, most of which 'simply complained that they engaged in political propaganda'. Since the Refugee Committee was engaged in raising money for the relief of Spanish Republicans, it is natural that some of its literature, and some of the speeches at meetings and on street corners, should have been anti-Franco and pro-Spanish-Republican; * * *. It may well be that this might have been thought to be a violation of the condition of the Refugee Committee's license from the President's War Relief Control Board that it should engage solely in relief and not in political action or propaganda; * * * the Refugee Committee's license was not revoked. But assuming that such literature and statements are to be

> considered propaganda (rather than an incident of fund-raising), there is no showing that it was un-American or subversive propaganda, since the official position of the United States was then anti-Franco." (fols. 184-9).

As a sample of the opinion of the time, the record contains this excerpt from 14 Chicago Law Review 256, 261:

> "Few subpoenas have ever been so broad as the one recently issued by the House Committee against the Joint Anti-Fascist Refugee Committee. The courts have always found some restriction as to time and subject matter. Here there is none. It should occasion little surprise then if the subpoena issued by the House Un-American Activities Committee were to be declared invalid." (S.M. p. 309).

The record also contains an excerpt from 60 Harvard Law Review 1193 concluding that:

> "Nothing in recent years has been as Un-American as the conduct of the hearings of the Congressional Committee on Un-Americanism." (S.M. p. 313).

The record indicates that as Appellant testified and as an article in 47 Columbia Law Review 416, noted, this was a "test case"; this was the first time the issue had arisen as to whether the activities of the House Committee were constitutional (S.M. p. 235, 308). The uncontradicted testimony indicates beyond doubt that Appellant had compelling moral and legal reasons for his position.

Appellant answered all questions asked of him by the House Committee. However, because the executive secretary, who had the books, did not produce them, Appellant and the others, as well as the executive secretary, were indicted and convicted as mentioned.

On April 25, 1951, the Sub-Committee of Medical Grievance Committee which first heard the matter, recommended

a three months' suspension. The Attorney-General of New York had adduced testimony over objection that the organization had been placed on the United States Attorney General's subversives list (and then only after Appellant's conviction) and that the dismissal of the complaint of the organization against the Attorney General in connection with that listing, had, at the time, been affirmed by the Circuit Court (S.M. p. 399). The Sub-Committee of the Medical Grievance Committee plainly made that listing a prime, if not the sole basis, of its finding (fol. 98). Later, however, the United States Supreme Court reversed and upheld the complaint of the organization in connection with the listing (Joint Anti-Fascist Refugee Committee v. McGrath 341 U. S. 123). On April 25, 1951 the entire Medical Grievance Committee, which did not hear any of the testimony, recommended, by a vote of six to four, a six months' suspension. On July 31, 1951 the Regent's Committee on Discipline which heard and reviewed the matter, wrote a lengthy opinion (fol. 111–193) in which doubt was expressed as to the jurisdiction of the Appellee and in which it stated it was taking jurisdiction to enable the Court to pass upon the matter (fol. 149). The Committee further found that there was no contradiction whatsoever as to the motives or any of the other testimony involved, and concluded Appellant had adopted "the traditional method" (fol. 179) of testing the constitutionality of the House Committee's course. *Sinclair* v. *U. S.* 279 U. S. 263, 299.

The Committee concluded:

> "We disagree with the Attorney-General's position, * * * reflected in the findings of the Medical Committee on Grievances, that, because respondent and the others of the Refugee Committee failed to produce its records before the Congressional Committee, they so blocked a search for the facts, that he may now be disciplined on the assumption that facts not shown by evidence to have

existed might have been disclosed had the records been produced.

"Since violation of the Federal Statute which respondent has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of respondent's explanation (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand; and we therefore recommend that respondent's license be not suspended, as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded." (fols. 191-3).

The Regents rejected the detailed report and recommendation of their own Committee on Discipline, and on September 8, 1951 voted to accept the recommendation of the Medical Grievance Board and imposed a six months' suspension without hearing any witnesses or attorneys. The dissenting opinion pointed out, Exhibit A pages 66-67:

"The Board of Regents, however, disregarded that recommendation. Instead, giving no reason whatsoever for its action, it confirmed the recommendation of the Medical Committee on Grievances—made, it must be remarked, on a record less complete than the one before the Committee on Discipline. While it is impossible to say what prompted the Regents' acceptance of the Medical Grievance Committee's recommendation that appellant's license be suspended for six months, it may be of some significance that, among the findings made by the Grievance Committee, and confirmed by the Regents, was the finding that 'Ever since 1947, the Committee (Anti-Fascist Refugee Committee) has been listed as subversive by the Attorney General of the United States.' Reliance upon that fact was, of course, improper, for, as the Committee on Discipline pointed out, that listing was entitled to no weight whatsoever in the present proceeding, and its utilization constituted

gross and prejudicial error. (See Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123)."

Appellant then instituted a proceeding to review that determination in the Supreme Court of the State of New York, Albany County. The matter was duly transferred on November 8, 1951 to the Appellate Division of the Supreme Court, Third Department, which in this case was the court of first instance. Prior to the hearing on the argument, the court heard argument in the cases of Doctor Auslander and Doctor Miller, two other physicians who were members of the executive board and who had also been convicted in the Federal Court in the District of Columbia. The Court affirmed the determination here, on the basis of its opinion in the prior case. The Appellate Division, Third Department then granted leave to appeal (279 App. Div. 1122) on the ground that a question of law was involved which should be passed on by the Court of Appeals. On February 26, 1953 the Court of Appeals affirmed the determination in all three cases. The majority opinion was written by Judge Desmond. The dissenting opinion was written by Judge Fuld. Re-argument was sought on March 5, 1953 and was denied on April 16, 1953, at which time the Court of Appeals granted Appellant's motion for a stay of all proceedings pending an appeal to the United States Supreme Court, and further granted a certificate that federal constitutional questions were raised and passed upon. The petition for an appeal to the Supreme Court of the United States was presented to the Chief Judge of the Court of Appeals and signed on May 7th, 1953. There is no further appeal or proceeding which can be taken in this cause in the Courts of the State of New York. The final disposition of the cases of Doctor Auslander and Doctor Miller are being held in abeyance pending the outcome of this appeal.

The Constitutional Questions Involved: The Manner in Which the Questions Were Raised and the Decision in Favor of the Validity of the Statutes.

The constitutional questions involved in this appeal are:

1. Are the statutes under which Appellant's medical license was suspended, so vague, ambiguous, indefinite and contradictory, and their meaning so uncertain, that their enforcement violates the due process clause of the Fourteenth Amendment?

2. Do the statutes on their face, and as construed and applied, violate the due process clause of the Fourteenth Amendment and the constitutional prohibitions against double jeopardy and double punishment, by predicating the suspension or revocation of a New York medical license upon the extraterritorial conviction of an act that is not a crime in New York, that involves neither moral turpitude nor intellectual unfitness, and that is not related to the practice of medicine?

3. Do the statutes on their face, and as construed and applied, violate the constitutional precept against legislative abdication, without guide-posts or standards, in connection with the crimes, the punishments, the hearings, and the evidence, depriving Appellant of a judicial hearing and the guarantee of due process?

4. Are the statutes as construed and applied, discriminatory, arbitrary and oppressive class legislation, violative of the constitutional provision for equal protection and do they constitute bills of attainder?

5. Do the statutes violate the precept that States may not impose domestic penalties for occurrences in Washington, D. C. where the United States has exclusive jurisdiction and exclusive power of legislation?

6. Do the statutes as applied, disregard Title 18, U.S.C.

section 402, a law of the United States, and thus violate Article VI of the Constitution?

7. Do the statutes as applied disregard the constitutional differentiation between a Law and a Resolution contained in, and thus violate, Article 1 section 7 of the Constitution?

The constitutional questions were raised in Appellant's answer to the charges served by the Appellee. The answer alleges that the statutes "violate the Federal Constitution" and "the due process clause thereof"; that they are "vague, uncertain and indefinite" and permit double punishment despite the "absence of moral turpitude" and though the act "was not and is not connected with respondent's practice of medicine" and "is not a crime under the laws of New York;" that the statutes "contain and constitute an unlawful delegation and abdication of legislative power and function," "without any guide-posts or standards" and permit "unlimited, arbitrary, capricious and discriminary action", so that "once the power exists, the sections are invalid irrespective of how the bodies act;" that the statutes "fail to establish an ascertainable standard of guilt or punishment"; that the statutes as "applied to the facts of this case are discriminatory" and "class legislation", and violate "the due process clause" of the Federal Constitution. Appellant further claimed that because contempt of Congress is not included in the 'Contempts Constituting Crimes" mentioned in Title 18 U.S.C. Section 402, the Appellant was not convicted of a "crime", so that the disregard of Title 18 U.S.C. section 402, was a disregard of a law of the United States, and violative of Article VI. Lastly, that since Title 2 U.S.C. section 192, under which Appellant was convicted, was the result of a Joint Resolution and not a Law, Appellant had not been convicted of "a crime under the laws of the United States", so that his suspension was the result of disregarding the constitutional differentiation

between a Joint Resolution and a Law mentioned in Article I Section 7.

The questions were also raised in Appellant's petition for review, where Appellant claimed "That Sections 6514 and 6515 of the Education Law violate the Federal and State Constitutions and are also unconstitutional as applied to the facts of the case, all as set forth in detail in said answer" (fols. 17-18). The questions were also raised on the arguments made before and in the briefs submitted to the Appellate Division of the Supreme Court of the State of New York, Third Department, which heard this cause as a court of first instance, and the Court of Appeals of the State of New York. In the Appellant's briefs before said Courts, Appellant claimed specifically in separate points with specific subdivisions and supporting authorities, that the statutes are unconstitutional on their face and as construed and applied, that they violate the due process clause of the Fourteenth Amendment, that suspending a license merely by reason of the conviction of an extra-territorial crime that is not an offense in New York, without the presence of moral turpitude or intellectual unfitness, and without any connection between the crime and the medical practice, "was the unconstitutional deprivation of petitioner's liberty without due process of law and double punishment for the same offense".

The Court of Appeals passed upon some of the questions raised and upheld the validity of the statutes. The Court of Appeals issued a certificate contained in the remittitur, to the effect that Federal constitutional questions were raised and necessarily passed upon. The Court of Appeals concluded with respect to the issue of constitutionality: "Stringent as it is, that statute needs no cutting down, for constitutionality's sake." (Exhibit A, page 57). The dissenting opinion of Judge Fuld stated with respect to the

constitutional issues: "In sum, then, the court's construction of the Education Law provision, particularly when taken with its grant to the Board of Regents of uncontrolled discretion, not only as to the matters on which they may rely in reaching a determination but also as to the measure of discipline, places the statutory scheme beyond the bounds of what is permitted to the legislature. To me, it seems not merely delegation run riot but legislative abdication. A legislature may not require that physicians, as a condition of their practice, live under the constant fear that they may be deprived of their right to practice if they offend against *any* law, *any* place. To be sure, as the court remarks, something may—and I assume must—be left to 'the good sense and judgment' of the Regents, but, while 'good sense and judgment' are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action. The fact that 'crime' has been committed *somewhere* is too vague, too capricious, too unrelated to anything that a citizen of our state is entitled to have considered, to be regarded as a standard for any legislation, much less for legislation that is said to authorize a penalty that may destroy a person professionally, that may result in the loss 'of all that makes life worth living.' (*Ng Fung Ho* v. *White*, 259 U. S. 276, 284.) Such delegation, uncontrolled, in my judgment, as it is, violates first principles. In *Matter of Small* v. *Moss*, 279 N. Y. 288, 299, we declared that 'The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field. Without the second rule as a corollary to the first rule there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative officer,' and in *Packer Collegiate Inst.* v. *University of State of N. Y.*, *supra*, 298 N. Y. 184, 189, after quoting that passage, we

stated that 'there must be a clearly delimited field of action and, also standards for action therein.' (See also, *Niemotko* v. *Maryland*, 340 U. S. 268, 273; *Matter of Fink* v. *Cole*, 302 N. Y. 216, 225). The wisdom of that constitutional safeguard is highlighted by its disregard in this case.

"For his federal offense, appellant has served a jail sentence. Unless the nature of the criminal statute or the circumstances of its infraction or some other evidentiary fact casts doubt upon his character or upon his past or anticipated conduct as a physician, his further suspension from practice is truly an additional penalty for that single offense, rather than the regulation of medical practice in the public interest. (Cf. *Ex parte Garland*, 4 Wall. (U. S. 333, 377.) The facts found by the Regents' Committee on Discipline, not challenged either by the Regents or by this court, prevent any other conclusion.

"I would reverse." (Exhibit A, pages 67-69.)

The questions involved are substantial.

1. The statutes under which Appellant's medical license was suspended, are so vague, ambiguous, indefinite and contradictory, and their meaning so uncertain, that their enforcement violates the due process clause of the Fourteenth Amendment.

Section 6514 (2b) of the Education Law permits suspension or revocation of a medical license upon the conviction of a New York physician "in a court of competent jurisdiction, either within or without this state, of a crime." In 1947, Appellant was convicted in the Federal Court in the District of Columbia, of failure to produce the organization's records before the House Committee. This act is deemed a misdemeanor under Title 2 U. S. C. Section 192, which does not require that the person subpoenaed have legal or other possessions of the records. There is no such offense in New York. Appellee's Committee on Discipline

noted: "default in the production of subpoenaed documents before the Congress or a Congressional Committee is not a violation of any provision of the New York Law" (fol. 142).

The word "felony" is defined in section 6514(1) by reference to section 6502, as being "any offense which if committed within the State of New York would constitute a felony under the laws thereof." The word "crime", however, is not defined in Section 6514 or 6515. According to the Court of Appeals herein, section 6514 means that if a New York physician is convicted outside of New York of what is a felony in the foreign jurisdiction but that is no offense in New York, his license cannot be revoked under subdivision 1, but if he is convicted "anywhere" in the world of an act that is a "crime" there but which in New York is either no crime or is "even meritorious," his license is subject to revocation under subdivision 2b. This position of the Court of Appeals was unprecedented and unsupported by any cited or other authority. In his dissent, Judge Fuld stated that the statute, with its meaning so fixed, is unconstitutional because: "The fact that 'crime' has been committed *somewhere* is too vague, too capricious, too unrelated to anything that a citizen of our state is entitled to have considered, to be regarded as a standard for any legislation, much less for legislation that is said to authorize a penalty that may destroy a person professionally, that may result in the loss 'of all that makes life worth living' (*Ng Fung Ho* v. *White*, 259 U. S. 284). Such delegation, uncontrolled, in my judgment, as it is, violates first principles" (Exhibit A, page 68). The word "crime" has always been deemed delimited, by Section 22 of the New York Penal Law and by the declared policy of New York against domestic punishment for extra-territorial crime, to offenses committed outside of New York that are also made criminal by a New York statute. This was the position of the dissenting opinion, supported by every

known authority. It is also the plain policy of subdivision 1 of section 6514. Section 22 of the New York Penal Law (McKinney's Consol. Laws of N. Y. vol. 39, Part I, page 27) states that: "No act * * * shall be deemed criminal or punishable except as prescribed or authorized by * * * some statute of this state * * *." *People ex rel. Blumke* v. *Foster*, 300 N.Y. 431, 433. The Court of Appeals herein agreed "it is the policy of our state not to decree forfeitures in our courts, if we can avoid them, for violations of the criminal laws of another jurisdiction". Exhibit A page 55. Judge Fuld accordingly pointed out: "Experience has taught that sheer literalism is more often than not a poor guide to meaning and that a judge must go beyond and outside the dictionary to ascertain the legislative purpose and design. This is especially so here, for reasons which we have discussed at length in analogous cases. (See, *e.g.*, *People ex rel. Marks* v. *Brophy, supra*, 293 N. Y. 469; *Matter of Donegan*, 282 N. Y. 285; see, also, *Matter of Garsson* v. *Wallin*, 304 N. Y. 702.) Thus, in *Matter of Donegan* (*supra*, 282 N. Y. 285, 292), we said that discipline 'partakes of the nature of punishment,' with the consequence that statutes imposing discipline 'must be strictly construed,' and, in the *Marks* case (*supra*, 293 N. Y. 469, 474), we declared, to 'decree forfeitures * * * because of violations of the criminal laws of another jurisdiction,' is contrary to the established 'public policy of this State.'

"For my own part, I cannot divine in the words of subdivision 2(b) of section 6514 any legislative instruction to apply them broadly and remorselessly. On the contrary, I find nothing to indicate that the legislature had any desire to change a policy which has been so often declared and so uniformly adhered to. There is nothing new in the words 'convicted * * * without this state'; the *Marks* case (*supra*, 293 N. Y. 469) dealt with virtually identical lan-

guage and the *Donegan* case (*supra*, 282 N. Y. 285) dealt with language equally broad. In the former case, this court, after noting that the question for decision was the meaning of the language contained in a commutation agreement—*conviction of 'a felony, "either in New York State or any other state"* '—declared (293 N. Y., at p. 474):

> 'The Atkins case (248 N. Y. 46, supra), held that when the Governor of this State in 1914 decreed that a released prisoner should forfeit his commutation if convicted of 'any felony,' the Governor referred only to a conviction of a crime described in our laws as a felony. We think the Governor who in 1935 ordered that this relator should suffer a similar forfeiture if convicted of 'a felony, either in New York State or any other state' meant the same thing.'

Those cases make it abundantly clear that the mere fact of conviction in another jurisdiction is not enough to warrant the imposition of an additional penalty in this state. It must be a particular kind of conviction.

"'Felony,' as a term of art, still retains much of its character as an infamous crime and it is universally used in American law to distinguish those breaches of the law which are of a more serious character. Despite that, we held that, when the legislators (*Matter of Donegan, supra*, 282 N.Y. 285) or the governor (*People ex rel. Marks* v. *Brophy, supra*, 293 N.Y. 469) used the word 'felony,' they meant only such acts as would be deemed a felony in New York. *Matter of Donegan, supra*, 282 N.Y. 285, is illustrative; we were there required to construe the sections of the Judiciary Law (§ 88, subds. 3, 4; § 477; now numbered § 90, subds. 4, 5) providing for disbarment of an attorney convicted of a felony under the federal law (old § 88, subd. 4; present § 90, subd. 5) as well as under our law. Donegan had been convicted of a conspiracy to commit a mail fraud, a felony under the federal law. It could logically and rea-

sonably be presumed that our legislature, when it required disbarment for conviction of a federal 'felony,' considered that all crimes classified as felonies by the federal law were of a sufficiently serious character to require such disbarment. Nevertheless, we held that even in that case we would not ascribe such an intention to the legislature in view of the established policy against forfeiture for violations of the laws of another jurisdiction and in view of the requirement that the statute be strictly construed.

"So, here, where the legislature has declared that it must be a conviction of a 'crime,' the same rules of policy and construction call upon us to hold that only acts which are criminal under our laws are included. Indeed, if any distinction is to be drawn between the two types of cases—that involving 'felony' and the one before us involving 'crime'—the argument is far stronger for limiting the term 'crime' than it is for limiting the term 'felony.' In enacting the provision under consideration, it is, of course, obvious that the legislature did not canvass all of the myriad 'crimes' in the other forty-seven states or under the federal law or under the laws of foreign countries—undoubtedly included in the statute's 'without the state,' if sheer literalism is the guide—and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license. Instances may readily be cited of acts—and I cull from the court's opinion (p. 4)—'in some other state (or country) * * * which we in New York consider non-criminal, or even meritorious.'[2]

"[2] The Regents' Committee on Discipline, for instance, called attention to the fact that, whereas our Domestic Relations Law (§ 5) permits marriage between first cousins, the State of Arkansas stamps it a crime (Ark. Stats. (1947) §§ 55-103, § 41-811, and see Nations v. State, 64 Ark. 467). I mention but two other instances. In a number of states, it is a violation of so-called segregation laws and a crime for a Negro passenger to refuse to occupy his assigned seat in a segregated section of a public bus. (See, e.g., Ala. Code (1940) tit. 48, § 301 (31a); La.S.A.-C.C. (1950) Art.

"It seems almost incredible to me that the legislature could have contemplated that such 'non-criminal' or 'meritorious' acts should be the predicate for a consequence so harsh as revocation or suspension of a physician's right to practice. Yet that is precisely what the court is now holding. It is no answer to say, as the court does—when it is pointed out that such 'a literal construction * * * will empower the Board of Regents to destroy a person' without the slightest warrant—that 'some reliance must be placed on the good sense and judgment of our Board of Regents, in handling any such theoretically possible cases' (Opinion, p. 4). That may well be so, and it is also true that the Board did not here disbar the licensee or revoke his license, but the fact is, as we wrote in *Packer Collegiate Inst.* v. *University of State of N.Y.*, 298 N.Y. 184, 190, a 'statute's validity must be judged not by what has been done under it but "by what is possible under it." ' And even formal censure, the minimum discipline that the statute prescribes, may itself be extremely damaging to a physician's career." (Exhibit A, pages 62-65).

Not only is the word "crime" undefined, unlimited in scope, and vague, but the meaning attributed to "felony" in subdivision (1) of the same section 6514 conflicts with the definition of "crime" (which the Court of Appeals held "includes misdemeanors as well as felonies"), in subdivision 2b. Though the same statute permits revocation of a medical license upon conviction "of a felony," the meaning of "a felony" is restricted by subdivision 1, to an act that is made a felony under New York law. If it is a felony

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45, § 195; N.C. Gen. Stat. (1950) § 62-121.71-72, and see *State* v. *Johnson*, 229 N.C. 701; S.C. Code (1952) § 58-1496; Texas Pen. Code, Art. 1659; Code of Va. (1948) § 56-329, and see *New* v. *Atlantic Greyhound Corp.*, 186 Va. 726.) And, in Kansas, it is a crime to sell or even to drink alcoholic liquor in a public place. (Kansas Gen. Stat. (1949) ch. 41-719, 803, and see *State* v. *Shackle*, 29 Kans. 341.)"

under the federal law only, the statute is inapplicable according to the authorities mentioned in the majority and dissenting opinions herein. This is so despite the fact that the physician's act may involve narcotics. (*Tonis* v. *Regents*, 295 N.Y. 286). In fact, the Attorney General of New York stated on page 15 of his brief in the *Tonis* case that "the test is * * * whether Dr. Tonis could have been convicted in the State courts and under the State law for the offense * * *." The same test was applied to an engineer's license in *Garsson* v. *Wallin*, 279 App. Div. 1111, aff'd. 304 N.Y. 702. Garsson had been convicted in the Federal Court in the District of Columbia of a federal felony involving moral turpitude; conspiracy to defraud the United States by reason of certain relations with a Congressman. When it was sought to revoke his engineer's license in New York on the ground that he had been convicted of "a felony", the same Appellate Division there, at the same term as here, held that although he had been convicted of a federal felony, it was not a felony in New York, and his license was not revoked, since "the offense for which respondent was convicted is related exclusively to an act against the Federal Government. There is no such crime known to the Penal Law of the State of New York * * *." The Court of Appeals there affirmed. The net result is that when a physician is convicted of a federal felony involving narcotics and moral turpitude, and is charged under section 6514 (1) of the Education Law, or when an engineer is similarly convicted, and charged under section 7210 (1) of the Education Law, the word "felony", which is plainly "a crime", receives one interpretation and the benefit of the policy against domestic punishment for foreign offenses. But when a physician is convicted of what is deemed a lesser offense, namely a federal misdemeanor that admittedly is no crime in New York and that admittedly involves no moral

turpitude or intellectual unfitness, he is met with a conflicting interpretation and policy, and his license is suspended.

Not only have the New York courts heretofore without exception followed the policy and interpretation mentioned in the authorities cited by Judge Fuld, but as a consequence, they have always heretofore applied the rule against imposing domestic disqualification for foreign offenses because "one governmental authority will not enforce penalties for the criminal laws of another." *Matter of Cohen,* 164 Misc. 98, aff'd. 254 App. Div. 571, aff'd. 278 N.Y. 584. *The Antelope,* 10 Wheat. 66, 123. *Logan* v. *U. S.,* 144 U.S. 263, 303. *O'Brien* v. *Neubert,* 3 Dem. (N.Y.) 161. *Loucks* v. *Standard Oil Co.,* 224 N.Y. 99, 102. *Sims* v. *Sims,* 75 N.Y. 466. *U. S.* v. *Lathrop,* 17 Johns. (N.Y.) 4, 7. *People* v. *Jennings,* 248 N.Y. 46, 52. *People* v. *Stovali,* 172 Misc. 469.

The test of "literalism" employed by the Court of Appeals here, is answered in the quoted excerpt from the dissenting opinion, as well as by the Court of Appeals itself in *Matter of River Brand* v. *Latrobe,* 305 N.Y 36, 43: " 'a thing which is within the letter of the statute is not within the statute unless it be within the intention of the lawmakers, but a case within the intention of a statute is within the statute, though an exact literal construction would exclude it. It is a familiar legal maxim that 'he who considers merely the letter of an instrument goes but skin deep into its meaning,' and all statutes are to be construed according to their meaning, not according to the letter.' "

Further, although "crime" may sometimes include misdemeanors and mean any violation of a law, nevertheless "in common usage the word 'crime' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only." Blackstone's Commentaries Wendell Ed. Bk. IV, Ch. 1, p. 5.

A "crime" is a "Gross violation of human law, in distinction from a misdemeanor or - - - other slight offense. • • • in present usage the term is commonly applied to grave offenses • • • ." Webster's New International Dictionary—2nd Ed.—Unabridged—Vol. 1 pp. 625-6. The term crime is "commonly used only of grave offenses." The Oxford New English Dictionary, Vol. II p. 1172. Funk & Wagnalls New Standard Dictionary Medallion Ed. p. 614. "In a general sense the word 'crime' might mean any offense of a deep and atrocious nature as distinguished from smaller offenses known as misdemeanors." *State* v. *Johnson* 202 La. 926, 930-1. *State* v. *Scott* 24 Vt. 127, 130. Where an insurance policy was to be void if the assured's death was caused by his "criminal violation of law" and his death was caused by violations of the traffic law which were "misdemeanors", nevertheless, after reviewing the distinction between "crime" and "misdemeanor", it was held that a crime "implies a wicked or heinous act", and the recovery of insurance allowed. *Van Riper* v. *Constitutional Government League* 1 Wash. 2nd. 635, 639. Since admittedly the act of which Appellant had been convicted was devoid even of moral turpitude, it does not fall within the ordinarily accepted meaning of "crime". In any event, the undefined term "crime" in Section 6514 (2b), is vague, and sets forth no standard for the Appellee, namely whether Appellee is to use the definition of any violation of a law, or the commonly accepted definition, namely an offense of a more atrocious dye as distinguished from a misdemeanor. Further, is Appellee to use New York standards of whether the act is a crime or a misdemeanor, or the standards of the foreign, convicting jurisdiction, and what if the act is no crime but is meritorious in New York?

"The right to practice medicine is a valuable property right. To deprive a man of it is in the nature of punish-

ent * * *." *Hawker* v. *New York*, 170 U.S. 189, 191. Be-
use discipline "partakes of the nature of punishment" the
atutes "must be strictly construed." Matter of Done-
an, 282 N.Y. 285, 292. Cases involving such discipline, in-
olve, as the Court of Appeals here said, "the imposition of
tringent additional penalties." (Exhibit A, page 55).
ecause of the "grave nature" of the punishment, and the
act that a "penalty" is involved, such statutes are examined
y the application of the vagueness doctrine. *Jordan* v.
DeGeorge, 341 U.S. 223, 231. "The crime 'must be defined
vith appropriate definiteness.' * * * Men of common intel-
igence cannot be required to guess at the meaning of the
nactment. The vagueness may be from uncertainty in re-
gard to persons within the scope of the act * * *." *Winters*
. New York, 333 U.S. 507, 515. What is invalid, is "the
xaction of obedience to a rule or standard that is so vague
nd indefinite as to be really no rule or standard at all."
Champlin v. *Commission*, 286 U.S. 210, 243. To compel
New York physicians to "live under the constant fear that
hey may be deprived of their right to practice if they offend
gainst *any* law, *any* place," as Judge Fuld noted, Exhibit
A, page 68, does not delimit the application of the term
"crime" but "leaves open therefore the widest conceivable
nquiry, the scope of which no one can foresee, and the re-
sult of which no one can foreshadow or adequately guard
gainst." *United States* v. *Cohen Grocery Co.* 255 U.S. 81,
89. As Judge Fuld stated: "The fact that 'crime' has been
committed *somewhere*, is too vague, too capricious, too un-
related to anything a citizen of our state is entitled to have
considered, to be regarded as a standard for any legislation
* * * that may destroy a person professionally." Exhibit
A, page 68.

It is unreasonable to attribute to New York physicians, the reasonable expectation that conviction of any type of

offense "anywhere" in the world, that is not a crime in New York, and that is not even related to the practice of medicine, endangers their New York medical licenses. Nor did any judicial opinion heretofore rendered, ever charge them with such knowledge. Such a statute hardly falls within the "fair notice" precept, *Winters* v. *New York,* 333 U.S. 507, 524. It makes a New York medical license hostage to the morals and policies of the rest of the world. A statute so vague, unlimited and conflicting in form and as interpreted, as in addition to permit within the scope of its language a prohibition against the genuine testing of new constitutional issues and "seeking judicial construction" upon pain and penalty of loss of a medical license on top of the jail punishment exacted and paid for the constitutional test, is void, oppressive and repugnant to the equal protection and due process precepts. *Ex Parte Young* 209 U.S. 123, 146, 147. If a physician cannot invoke his right to test legislative acts, without the fear of losing his livelihood, in addition to the sentence served for the test, he loses the rights of a citizen. It makes the physician a cowed vassal of the state. It becomes a bill of attainder directed against physicians who would test the constitutionality of legislation or acts in pursuance thereof. It violates first and fundamental principles. To answer, as the Court of Appeals did, that the type of crimes the Appellee will select for discipline, must be left to their "good sense and judgment", Exhibit A, page 56, not only condones plain legislative abdication without standards, but as Judge Fuld stated, overlooks the precept that " 'a statute's validity must be judged * * * ' by what is possible under it.' " Exhibit A, page 65.

II. The statutes on their face, and as construed and applied, violate the due process clause of the Fourteenth Amendment and the constitutional prohibitions against double jeopardy and double punishment, by predicating the sus-

pension or revocation of a New York medical license upon the extraterritorial conviction of an act that is not a crime in New York, that involves neither moral turpitude nor intellectual unfitness, and that is not related to the practice of medicine.

The Court of Appeals fixed the meaning of the statutes here so that a New York physician convicted outside of New York of an act that is not a crime in New York, that involves neither moral turpitude nor intellectual unfitness, and that is not related to the practice of medicine, may nevertheless have his license suspended or revoked. The Court based its decision on the ground that "The Legislature knows how to state such limitations when it so desires." Exhibit A, pages 56-7. Judge Fuld stated: "In essence, then, the gist of the findings by the Committee on Discipline appears to be this: that the crime of which appellant was convicted did not, as the Supreme Court unequivocally stated, involve moral turpitude (see *Sinclair* v. *United States, supra,* 279 U. S. 263, 299), and that the record was barren of evidence reflecting on appellant as a man or a citizen, much less on his professional capacity or his past or anticipated conduct toward his patients." * * * "It is not without relevance to observe that, in the process of time, practically every calling necessitating skill has been subjected in some measure to the requirements of a license. The lawyer and the physician have been followed by the dentist, the teacher, the barber, the plumber and many others. It may not be long before the list embraces the butcher and the baker. To what extent the public interest requires protection from incompetent or dishonest practitioners of medicine or of plumbing is, of course, for the legislature to decide. But there can be no gainsaying the fact that the legislature advances into the frontiers of the individual's constitutional right to liberty and property,

when it undertakes to deprive a man of his practice or trade for reasons unconnected with its proper exercise. (Cf. *Bartos* v. *United States District Court*, 19 F. (2d) 722.) Exhibit A, pages 61, 67.

Appellant served a jail sentence and an actual suspension for those five months from his medical practice. He now faces the additional punishment of a six months' additional suspension of practice by reason of that conviction which the Court of Appeals here agreed involves no moral turpitude. The Court of Appeals stated here: "see, as to there being no moral turpitude in this offense, *Sinclair* v. *U. S.*, 279 U. S. 263, 299." Exhibit A, page 56.

It is fundamental that legislation such as is involved here, must bear "a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare", that otherwise, it will "invade rights guaranteed by the Fourteenth Amendment." *Liggett* v. *Baldridge*, 278 U. S. 105, 111; *California Reduction* v. *Sanitary*, 199 U. S. 306, 318. "A state cannot 'under the guise of protecting the public, arbitrarily interfere with * * * lawful occupations or impose unreasonable and unnecessary restrictions * * *.'" *Liggett* v. *Baldridge*, 278 U. S. 105, 111; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 278. "The judgment of the legislature is not unfettered. The limitation upon individual liberty must have some appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution." *Herndon* v. *Lowry*, 301 U.S. 242, 258.

If the statute "purported to * * * impose conditions which have no relation to the applicant's qualifications to practice dentistry, the statute would, of course, violate the due process clause of the Fourteenth Amendment". *Douglas* v. *Noble*, 261 U. S. 165, 168. The statutes involved here "are designed to protect the people from the ministrations

of incompetent, incapable and ignorant persons, and to avoid the consequent harm to the health and physical well-being." *People* v. *Laman*, 277 N. Y. 368, 381.

Conviction of a foreign offense that New York itself has not declared in its Penal Law or elsewhere to be violative of the general welfare of the people of New York should not enable an administrative agency of New York to suspend a medical license when the sole interest of that agency is to regulate the practice of medicine in the interest of the public of New York. "If detriment to the public health * * * has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced * * * and none exists." *Liggett* v. *Baldridge*, 278 U. S. 105, 111.

Since "the right to continue" in a profession "cannot be arbitrarily taken", if the regulations "are appropriate to the calling or profession * * * no objection to their validity can be raised * * *. It is * * * when they have no relation to such calling or profession * * * that they can operate to deprive one of his right to pursue a lawful vocation." *Dent* v. *West Virginia*, 129 U. S. 114, 121, 122. Thus, legislation requiring the taking of an oath that the individual was not guilty of certain acts, in order to be permitted to continue in his profession, was declared invalid because "the acts * * * have no possible relation to their fitness for those * * * professions. There can be no connection between the fact that Mr. Cummings entered or left the State of Missouri to avoid enrolment or draft in the military service * * * and his fitness to preach the doctrines * * * of his church * * *. It is manifest upon a simple statement of many of the acts and of the professions and pursuits, that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition for allowing the exercise of the professions and pursuits." *Cummings* v.

Missouri, 4 Wall. 277, 319, 320; ***Ex Parte Garland,*** 4 Wall. 333, 377, 379.

An attorney might be disciplined "If convicted of a misdemeanor which imports fraud or dishonesty". Ex Parte Wall 107 U. S. 265, 273. Discipline requires at least the presence of moral turpitude. "The presence of moral turpitude has been used as a test in a variety of situations including legislation governing the disbarment of attorneys and the revocation of medical licenses." *Jordan* v. *DeGeorge,* 341 U. S. 223, 227.

In the absence of even moral turpitude, the suspension or revocation of a medical license because of a physician's conviction of what is deemed a misdemeanor in another jurisdiction, is additional punishment for the same offense. The Court of Appeals recognized this elsewhere when it held that "Denial or revocation of a license because of guilt of an offense which tends to show moral or intellectual unfitness does not constitute punishment for this offense • • •. It is only a measure of protection to the public." *Mandel* v. *Regents,* 250 N. Y. 173. "The disabilities created • • • must be regarded as penalties—they constitute punishment." *Cummings* v. *Missouri,* 4 Wall. 277, 320; *Ex Parte Garland,* 4 Wall. 333, 377, 379. The Court of Appeals stated that Section 6514 "empowers the Regents to impose a penalty." Exhibit A, page 57.

But Appellant was punished once. He served a jail sentence. To punish him again by a suspension of his medical license for an extra-territorial offense devoid of moral turpitude, unrelated to his profession, and therefore unrelated to the regulation of medical practice in the public interest, is double punishment for the same offense. "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense," and "no narrow or illiberal con-

struction should be given" to this precept. *Ex Parte Lange*, 85 U. S. 163, 168; *Coy* v. *U. S.*, 156 F. 2d 293, 295. Constitution of New York, Article 1, Section 6, in McKinney's Consol. Laws of N. Y., Vol. 2, page 95.

As Judge Fuld noted here: "For his federal offense, appellant has served a jail sentence. Unless the nature of the criminal statute or the circumstances of its infraction or some other evidentiary fact casts doubt upon his character or upon his past or anticipated conduct as a physician, his further suspension from practice is truly an additional penalty for that single offense, rather than the regulation of medical practice in the public interest. (Cf. *Ex parte Garland*, 4 Wall. (U. S.) 333, 377.) The facts found by the Regents' Committee on Discipline, not challenged either by the Regents or by this court, prevent any other conclusion." Exhibit A, page 68.

III. The statutes on their face, and as construed and applied, violate the constitutional precept against legislative abdication, without guide-posts or standards, in connection with the crimes, the punishment, the hearings, and the evidence, mentioned in those statutes, and deprived Appellant of a judicial hearing and of his liberty and property without due process.

(a) As to the crimes involved in the statutes. The Court of Appeals held here, that the Appellee has unlimited power to revoke the license of a New York physician who has been convicted of a crime "anywhere" in the world. Exhibit A, page 57. As Judge Fuld noted in his dissent: "it is, of course, obvious that the legislature did not canvass all of the myriad 'crimes' in the other forty-seven states or under the federal law or under the laws of foreign countries * * * and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license. Instances may readily be cited of acts —and I cull from the Court's opinion (p. 4)—'in

some other state (or country) * * * which we in New York consider noncriminal, or even meritorious." Exhibit A, page 64. The Court of Appeals stated plainly that there are no standards to guide the Appellee in the crimes it may choose to discipline, except the "good sense and judgment of our Board of Regents." Exhibit A, page 56. In the meantime, as Judge Fuld said, physicians "must live under the constant fear that they may be deprived of the right to practice if they offend *any* law, *any* place." Exhibit A, page 68. This fear is constant, because no time limit is involved, and what is "good sense and judgment" on the part of one Board of Regents may not be that with changing times or subsequent Boards. As the dissent point out: "while 'good sense and judgment' are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action." Exhibit A, page 68. "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." *U. S.* v. *Reese*, 92 U.S. 214, 221. If the courts are thus delimited, certainly an administrative board should be, especially when its admitted function is to regulate the practice of medicine in the public interest, and not add punishment to punishment. To endow the Appellee with this "net large enough to catch all possible offenders", to permit it to use its office as a cloak to inflict additional punishment on physicians for matters unconnected with their medical practice, is to open up fields of political and other ramifications whose consequences need no belaboring. The law would become a dangerous weapon in the hands of the Appellee, and the physician a second class citizen. It is

unconstitutional "to leave room for the play and action of purely personal and arbitrary power. • • • the very idea that one man may be compelled to hold his life or the means of living or any material right essential to the enjoyment of life at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369.

(b) There is also complete legislative abdication with respect to the punishment. In the New York Penal Law, like the Penal Law of other jurisdictions, the legislature defined the various crimes, defined the degrees of the crimes, and fixed appropriate ranges of punishment corresponding to the particular crimes involved. Such guideposts and standards are utterly lacking here. In fact, here, the Appellee has unlimited discretion to reverse the legislative intent indicated in the Penal Laws. The statutes merely state that the Appellee may impose discipline from censure through revocation, but there is no guidepost or standard as to what crimes draw which punishments. The Appellee thus has the power to revoke a medical license for an extraterritorial crime that is meritorious in New York, and that involves no moral turpitude or intellectual unfitness. On the other hand, the Appellee may impose a mere censure upon a physician who commits a serious crime directly connected with his medical practice. What is more, the Court of Appeals here stated that the Courts are "without jurisdiction" to interfere with the type or amount of punishment visited by the Appellee upon a New York physician, even though the Appellee may have "ignored weighty considerations and acted on matters not proper for consideration." Exhibit A, page 57. The Appellee is therefore utterly immune by statute and by judicial declaration. Judge Fuld stated: "However, there is no more reason here, than with

other discretionary matters, why some limit should not be imposed on the exercise of discretion, and judicial review sanctioned, where that exercise is unsupportable on rational grounds and becomes arbitrary and capricious. If the statutory authority of the Regents is, in truth, as the court here holds,[4] so broad, so unrestrained, then I venture, the statute transcends constitutional limits." As the dissenting opinion concluded, such unlimited power and unfettered discretion "as to the measure of discipline, places the statutory scheme beyond the bounds of what is permitted to the legislature" and is "not merely delegation run riot but legislative abdication", and "violates first principles." Exhibit A, pages 67-8. These statements are particularly apposite in view of the report of Appellee's own Committee on Discipline that "we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand" (fol. 192). If Appellee's power is so unfettered that it can disregard the record here, and disregard its own Committee's report, and if such arbitrary and capricious power "unsupportable on rational grounds" cannot even be reviewed judicially, then truly what is involved is "legislative abdication" that "violates first principles."

(c) There is ambiguity and contradiction, without standards, as to the purpose of the "hearing" mentioned in sections 6514(2) and 6515(4). The Court of Appeals held here that the hearing is solely for the purpose of adducing testimony reflecting upon the punishment, because "Of course the statute itself was justification for taking the conviction as a professional fault, and the Regents receiving

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[4] In the course of its opinion, the court has written (Opinion, p. 6):

"As to the assertions, by appellants, that the Regents *dealt too severely with them*, or that the Regents, in deciding on punishment, *ignored weighty considerations and acted on matters not proper for consideration*, it is enough to say that we are wholly without jurisdiction to review such questions. (Emphasis supplied.)"

voluminous testimony as to the nature of the work of the Joint Anti-Fascist Refugee Committee, and the character and purposes of these petitioners, are presumed to have taken all those things into account in fixing the penalties," but this testimony "could not change the admitted fact of their conviction." Exhibit A, pages 57, 54. But section 6515(4) states that the charges must be determined "upon their merits" and the physicians can be "found guilty" or "not guilty". Appellant had adduced voluminous uncontradicted testimony to show that although he had been found guilty in the criminal trial which had been limited to constitutional issues, he was not actually guilty. Appellee's Committee on Discipline concluded "Our examination of the record discloses no such basis" "for concluding that these views and assertions were not honestly held and made" and they "sufficiently explain the refusal * * * to produce the * * * records, that being the only method by which the legal objections * * * could be judicially determined and the traditional method * * *." (fol. 179)

The holding of the Court of Appeals here, is in direct conflict with the wording of the statute and also with its holding in *Matter of Donegan*, 265 App. Div. 774, affd. 294 N. Y. 704, where the Court, mindful of the holding in *Matter of Donegan*, 282 N. Y. 285, that the foreign conviction is only a "prima facie finding of guilt," sanctioned the use of the hearing to establish innocence despite a prior conviction. In that case an attorney had been convicted of a mail fraud in the Federal Court in New York by a Court and jury. The conviction was affirmed by the Court of Appeals for the Second Circuit. Nevertheless, when he was brought up in disbarment proceedings, it was held that the Board had a right to re-examine the question of innocence or guilt. Thereafter he was found to have been innocent despite the fact that the Federal Court and jury

had found him guilty, and the recommendation that he not be disbarred was upheld by the Court. The Court of Appeals at bar has plainly adopted a conflicting and discriminatory procedure. Appellee is therefore apparently to have unlimited power and discretion to declare that on some occasions hearings will be limited to establishing the conviction and that the taking of testimony will merely be for purpose of fixing the punishment. On other occasions, the hearing will be used as an independent search into the original guilt or innocence.

Such "hearings" at the discretion of the Appellee, sanctioned by the Court of Appeals, are no real hearings. They guarantee the physician just one thing: that the Regents will use their discretion as they see fit, and no Court will interfere. Further, section 6514 is not limited to discipline predicated upon convictions of crimes. Aside from subdivision 2b, all the other subdivisions refer to matters that must necessarily be examined in a real hearing; and they cannot be established as readily as a prior conviction. Therefore, the hearings provided for in section 6515, which section is not limited only to hearings involving sub-division 2b of section 6514, must of plain necessity, involve hearings on all the facts and merits. There is nothing in section 6515 that can possibly serve as the basis for a restricted hearing, restricted in the manner the Court of Appeals here sanctions, when sub-division 2b of section 6514 is involved. To delimit the hearing, to disregard the evidence adduced on that hearing bearing on original guilt or innocence, is to deprive Appellant of a real hearing. That the Court of Appeals intended to treat the role of the Regents here as that of a "sentencing judge", is confirmed by that Court's citation of *Williams* v. *New York*, 337 U. S. 241, 246 *et seq.* A hearing before a "sentencing judge" on an application to revoke a medical license, is no hearing at all. To sanction a total disregard of the evidence as far as original guilt or

innocence is concerned, to suspend appellant's license despite the detailed report of the Appellee's own Committee on Discipline and the evidence, is to deprive Appellant of a judicial hearing and of his liberty and property without due process. *Ng Fung Ho* v. *White,* 259 U. S. 276, 284.

(d) The Court of Appeals refused to interfere even though the Appellee on the hearing, "ignored weighty considerations, and acted on matters not proper for consideration." Exhibit A, page 57. Section 6515 (5) requires that a determination be based upon "legal evidence". In the hearing before the Sub-Committee of the Appellee's Medical Grievance Board, the Attorney-General of New York, over objection, repeatedly adverted to the fact, in page after page of testimony, that the Organization had been placed on the United States Attorney General's subversives list. (It had not been on the list even at the time of Appellant's indictment.) The Attorney General of New York also adduced testimony that the complaint of the organization against the United States Attorney General in connection with that listing had been dismissed by the District Court and the dismissal had been affirmed by the Circuit Court of Appeals. The Sub-Committee of the Medical Grievance Committee and the entire Medical Grievance Committee, predicated their decision to suspend Appellant's license, if not completely at least in part, upon that listing (fol. 98). But subsequent to the hearing, the Supreme Court of the United States reversed. *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123. Plainly the reference to the listing was as Judge Fuld noted, "gross and prejudicial error." Exhibit A page 67. *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123. *United States* v. *Remington,* 191 F. 2d 246, 252. Despite that reversal by the United States Supreme Court, the Appellee simply disregarded the report and recommendation of its own Committee on Discipline, disregarded the

reversal, and upheld the recommendation of the Medical Grievance Committee in imposing this six months' suspension. Plainly the suspension was not based on "legal evidence." Despite this undisputed, patent, gross and prejudicial error, the Court of Appeals held that it had no jurisdiction to interfere. Although a number of similar illustrations were complained of in the Court of Appeals, this one alone should suffice to illustrate the type of "hearing" and the type of "evidence" involved.

It is only realism to recognize that this listing and the dismissal of the Organization's complaint in the courts below the United States Supreme Court, undoubtedly furnished the raison d'etre of this entire proceeding against the Appellant. Had it been another organization, it is fair to assume that nothing would have happened. In any event, a hearing at which "evidence" of the listing and the affirmance of the dismissal of the organization's complaint may be adduced and used in the findings, but in which the Appellee may disregard the reversal in the Supreme Court, is a hearing not supported by legal evidence, a hearing involving an application of an erroneous and reversed principle of law, and not a fair hearing. The refusal of the Court of Appeals to intervene despite the fact that this error is not even disputed, deprived Appellant of the guarantee of due process of law. *Ng Fung Ho* v. *White*, 259 U. S. 276, 284.

As Judge Fuld stated here: "However, there is no more reason here, than with other discretionary matters, why some limit should not be imposed on the exercise of discretion, and judicial review sanctioned, where that exercise is unsupportable on rational grounds and becomes arbitrary and capricious. If the statutory authority of the Regents is, in truth, as the court here holds, so broad, so unrestrained, then, I venture, the statute transcends constitu-

tional limits." * * * "Such delegation, uncontrolled, in my judgment, as it is, violates first principles. In *Matter of Small* v. *Moss*, 279 N. Y. 288, 299, we declared that 'The Legislature must set bounds to the field, and must formulate the standards which shall go·rn the exercise of discretion within the field. Without the second rule as a corollary to the first rule there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative officer,' and in *Packer Collegiate Inst.* v. *University of State of N. Y., supra*, 298 N. Y. 184, 189, after quoting that passage, we stated that 'there must be a clearly delimited field of action and, also standards for action therein.' (See also, *Niemotko* v. *Maryland*, 340 U. S. 268, 273; *Matter of Fink* v. *Cole*, 302 N. Y. 216, 225). The wisdom of that constitutional safeguard is highlighted by its disregard in this case." Exhibit A p. 67, 68. *Field* v. *Clark*, 143 U. S. 649, 692. *U. S.* v. *Grimaud*, 220 U. S. 506, 520. *Panama* v. *Ryan*, 293 U. S. 388, 415. *Schechter* v. *U. S.*, 295 U. S. 495, 537.

IV. The statutes as construed and applied, are discriminatory, arbitrary and oppressive class legislation, violative of the constitutional provision for equal protection and constitute bills of attainder.

Heretofore physicians convicted of federal felonies that are not felonies in New York, received the benefit of the legislative definition limiting the felonies to those defined as such by the New York Law. They also received the benefit of the traditional policy of New York not to add additional domestic punishment for conviction of foreign offenses. The Court of Appeals now, however, rules that the word "crime" (which is held to include felonies as well as misdemeanors) in subdivision 2b of the same statute, when applied to a New York physician convicted of what is deemed a federal misdemeanor, will receive a different in-

terpretation and the physician will not receive the benefit of the mentioned policy. Section 6514 (2b) with its meaning so fixed, thus becomes discriminatory, oppressive class legislation, arbitrarily and unjustly discriminating against physicians convicted of the lesser offense. It deprives Appellant of the guarantee of equal protection. There is no basis in justice, reason, or in relationship to medical practice, for such discrimination, and no real and substantial relation of any such discrimination to the public health, safety, morals or any other phase of the general welfare. As the dissent pointed out, "the argument is far stronger for limiting the term 'crime' than for limiting the term 'felony' ". Exhibit A page 64.

Further, to permit attorneys to have the benefits of the procedure mentioned in *Matter of Donegan* 265 App. Div. 774, aff'd 294, N. Y. 704; also 282 N. Y. 285; where the New York supervisory body for attorneys was authorized to investigate the question of foreign conviction and actually find the attorney innocent despite a federal court and jury verdict of guilty and an affirmance thereof, and to deny that procedure to physicians, is again indicative of the discriminatory nature of this legislation, with its meaning so fixed, and again indicative of the lack of equal protection.

To grant physicians full hearings in connection with all other sub-divisions of section 6514, but not in connection with sub-division 2b; to hold that the foreign conviction automatically establishes the "professional fault", so that the evidence "could not change the admitted fact of their conviction" Exhibit A pages 54, 57; to hold that a reversal by the United States Supreme Court of a holding in connection with a material matter, may be disregarded, all point up the discriminatory, oppressive nature of this class legislation and the denial of the equal protection principle. "Though the law itself be fair on its face and impartial in

appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373–4 "Class legislation discriminating against some and favoring others, is prohibited * * *." *Barbier* v. *Connolly*, 113 U. S. 27, 32. "But doubtless, unreasonable discriminations, if avowed in formal law, would not survive constitutional challenge". Mr. Justice Frankfurter in *Garner* v. *Los Angeles Board* 341 U. S. 716, 725.

Particularly because of the listing of the organization, the reference thereto in the hearing before the Appellee, the temper of the times, the reference to the affirmance of the dismissal of the organization's complaint against that listing, the disregard of the later reversal by the Supreme Court, and the utter lack of even an attempt to controvert Appellant's testimony, the Appellant must conclude that Appellee has employed the statutes involved as a bill of attainder. "The Constitution deals with substance not shadows." *Cummings* v. *Missouri* 4 Wall. 277, 325. There is reason to believe the statutes were used "to impose pains and penalties for past lawful associations * * *." *Wieman* v. *Updegraff*, 344 U. S. 183, decided by the Supreme Court December 15, 1952. Because the foreign conviction was itself deemed "a professional fault", the statutes were used "to inflict punishment without a judicial trial * * *," *Cummings* v. *Missouri* 4 Wall. 277, 323. *Garner* v. *Los Angeles* 341 U. S. 716, 722. The Appellee "determines the sufficiency of the proof adduced whether conformable to the evidence or not; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense". *Cummings* v. *Missouri* 4 Wall. 277, 323. The

"power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution". *Ex Parte Garland,* 4 Wall. 333, 379.

V. The statutes as construed violate the precept that a state may not impose penalties for acts or omissions occurring beyond its jurisdiction in territory like Washington, D. C., where the United States has exclusive jurisdiction. The contempt and conviction at bar both occurred in Washington, D. C., where the United States has exclusive power of legislation and exclusive jurisdiction. The statutes here which imposed penalties for conduct in Washington, D. C., are invalid because "a State attempts in this manner to affect conduct outside its jurisdiction or the consequences of such conduct, and to infringe upon the power of the United States," and because "the State undertakes to go beyond its jurisdiction into territory where the United States has exclusive control." *Western Union* v. *Brown,* 234 U. S. 542. "It is of the highest public importance that the jurisdiction of the State should be resisted at the borders of those places where the power of exclusive legislation is vested in Congress by the Constitution. * * * If it is desirable that penalties should be inflicted for a default * * * accruing within the jurisdiction of the United States, Congress only has the power to establish them." *Western Union* v. *Chiles,* 214 U. S. 274.

This principle becomes doubly important here where the default in the production of the books was deemed an offense only in Washington, D. C. and not in New York, and where there was no relationship between the act and the regulation of medical practice in the interests of the public of New York State.

VI. The statutes as applied, disregard Title 18, U.S.C. section 402, a law of the United States, and thus violate Article VI of the Constitution.

The indictment against Appellant was for "Contempt of the House of Representatives Committee" (S.M. p. 126). The Attorney General of New York said the conviction was for "contempt of Congress" (S.M. p. 459). The word "crime" is not mentioned in the indictment or judgment of conviction (S.M. p. 130). Title 18 U. S. C., defines "crimes" against the United States. Section 402 thereof is headed: "Contempts constituting Crimes." The contempt of which Appellant was found guilty is not mentioned there at all. At the bottom of that section the following appears: "all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law." Thus, the contempt at bar is not designated even as a federal "crime". Although it is a contempt that may be "punished" according to the "prevailing usages at law", it is not listed as a federal crime and therefore the requirement of section 6514 (2b) that there be a "conviction of a crime", is missing. Appellee failed to discharge the burden of proving there was a crime by failing to resolve the doubt, to say the least, that section 402 of Title 18 throws upon the existence of a "crime" at bar. To disregard Title 18 U. S. C. section 402 is to disregard a law of the United States.

Title 2 U. S. C. section 192 under which Appellant was convicted, states that such a contempt "shall be deemed" a misdemeanor but since said contempt was excluded from the section on "Contempts constituting Crimes", and since such a contempt is merely "deemed" a misdemeanor for purposes of "punishment" (Title 18 U. S. C. sec. 402), the word "deemed" must be accorded its natural meaning in its proper context as a "deeming" merely for purposes of "punishment". "Generally speaking, when you talk of a thing being deemed to be something, you do not mean that it is that which it is to be deemed to be. It is

rather an admission that it is not what it is to be deemed to be and that notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed that thing." *The Queen* v. *County Council of Norfolk,* 60 L. J. Q. B. (N. S.) 379, 381–2.

Although this contempt is treated for purposes of punishment as though it were a misdemeanor, it is not a "crime" because it nowhere appears in Title 18, U. S. C. section 402 or in the indictment, as a "crime". It is one thing to make a contempt a crime as in Title 18 section 402. Such contempts become "crimes". It is a different thing to treat an act, for the purposes of punishment, with the same effect as though it were a crime. Things equal in effect, are not identical. Both a heart attack and a bullet can kill; they have that effect; nevertheless they are not the same. Although the effect is the same the failure to designate this contempt as a federal crime means that it is not a crime especially in proceedings such as these where statutes "must be strictly construed" in favor of the Appellant because they are "penal" in nature. (*Matter of Donegan* 282 N. Y. 285). In addition, there is the distinction between a "crime" and a "misdemeanor" adverted to before.

VII. The statutes as applied disregard the constitutional differentiation between a Law and a Resolution contained in, and thus violate, Article I Section 7 of the Constitution.

There is no crime under the laws of the United States unless that crime is defined by an "Act" or a "Statute" of Congress. "One may not be punished for crime against the United States unless the facts shown plainly and unmistakenly constitute an offense within the meaning of an Act of Congress." *Donnelly* v. *U.S.* 276 U.S. 505, 511. "We agree that the courts * * * in determining what constitutes an offense against the United States, must resort to the statutes of the United States enacted in pursuance of the Constitu-

tion." Re *Kollock* 165 U.S. 526, 533. *U.S.* v. *Eaton* 144 U.S. 677, 687-8.

The Constitution treats an "Act" of Congress as different from a "Joint Resolution." An "Act" reads: "Be it 'enacted' by the Senate and House" (Title 1 U.S.C. secs. 21, 101). A "Joint Resolution" reads: "Be it resolved by the Senate and House" (Title 1 U.S.C. secs. 22, 102). There are basic, historical and legal differences resulting in a differentiation that is plainly crystallized in the Constitution (Art. 1, sec. 7 clauses 2 and 3; Art. III; Art. VI). "Law Making in the U. S." by Dr. Harvey Walker—1934 ed. p. 317. Only "Laws" that are "enacted" as such are made part of the law of the land. Art. 1, sec. 7; Art. VI. Joint Resolutions, even though they go through the same preliminary processes, merely "take effect"; Art. 1, sec. 7; they are not included as part of the law of the land. They are used for miscellaneous matters such as extending an invitation to Lafayette to visit the United States (Dec. 6, 1824; 18th Congress, 2nd session House Journal p. 8), or to welcome Kossuth (Dec. 15, 1851; 32nd Cong. 1st sess.; House Journal p. 89), or to give notice of the abrogation of a treaty (Apr. 20, 1846, 29th Cong.; House Journal p. 695, 697).

The offense of which Appellant was convicted, embodied in Title 2, U.S.C. sec. 192, is not mentioned in an "Act" of Congress, but a "Joint Resolution". 52 Statutes 942. The offense of which Appellant was convicted is therefore not a crime under the "laws" of the United States. The resolution merely "took effect". "A Joint resolution * * * has the effect of law." *Watts* v. *U. S.*, 161 F. 2d 511; c. d. 68 S.Ct. 81. Thus, a "contempt constituting a crime" (Title 18 U.S.C. sec. 402), and this contempt are equal in effect only. Again, things equal in effect only are not identical. Appellant was convicted not of a federal crime but of what was "deemed for purposes of punishment" and

treated in "effect" as though it were an offense. When this Joint Resolution was passed, there was asked from the floor of Congress: "is it within the power and jurisdiction of the House to amend the statutory law of the United States in the form of a joint resolution and not in the form of a bill?" The answer in part was: "Strictly speaking, proposed laws should be introduced and all changes in law made through the introduction of bills. Personally I would like to see this joint resolution feature abandoned, except where it involves something which is not really fundamental law." Congressional Record Vol. 83, p. 8171, Part 7, 75th Cong.; 3rd Session.

Appellee claimed the foregoing contention was "unpersuasive". But the burden of being persuasive rested upon Appellee who has never attempted to explain away Title 18 U.S.C. Sec. 402 or the constitutional differentiation between a Law and a Joint Resolution. Since the burden rested upon the Appellee to prove that the Appellant has been convicted of a crime and since crimes can only be created by Acts of Congress and not Joint Resolutions and since the statutes "must be strictly construed", the Appellee failed to discharge the burden resting upon it. To disregard the differentiation mentioned in the Constitution between a Law and a Joint Resolution is to disregard Article 1 Sec. 7.

VIII. The questions are of importance to the public and to all professions and pursuits. As Judge Fuld stated here: "the present decision has an importance that transcends and reaches far beyond this case. And that —— its impact over the years —— is what so deeply troubles and concerns me." (Exhibit A page 65). The constitutionality of the statutes involved has never been passed upon before. Further, this is the first time it has been held that a medical license may be suspended or revoked by reason of the conviction for an offense that is not violative of New York law,

that involves neither moral turpitude nor intellectual unfitness, and that is not related to the medical practice. The ramifications and repercussions of such a decision on all callings, need no lengthy discussion. The Court of Appeals agreed here that the statutes are "stringent". Exhibit A page 57. The matter affects every physician in New York State. In the Appellate Division and Court of Appeals some 1700 physicians from all over New York State signed a brief amicus on behalf of the Appellant. The American Civil Liberties Union did likewise in a separate brief urging unconstitutionality. The Attorney General of New York himself alluded to "the importance of the rights invoked by the Petitioners" in a brief in the Court of Appeals.

A decision here will help settle not only serious constitutional questions, but may well prevent recurring questions of constitutionality in connection with medical licenses and in other pursuits. A decision here may well remove any doubt in connection with the issue of whether the legislature may undertake "to deprive a man of his practice or trade for reasons unconnected with its proper exercise," as the dissent phrased it. A decision here may also settle the plainly unreasonable conflict among the holdings in the Court of Appeals that the license of New York physicians who are convicted of foreign felonies that are not crimes in New York are not subject to revocation under one subdivision of the statute, but that physicians convicted of foreign "crimes" including the lesser offenses of misdemeanors that are similarly not crimes in New York, may nevertheless have their licenses revoked under another subdivision.

Further, since Appellant's conviction resulted from testing the validity of acts of a House Committee, a determination here may help decide whether in addition to paying a jail penalty for that test, physicians and others may be

deterred from such tests by being deprived of their means of livelihood.

A decision here will help clarify the purpose of the hearing mentioned in Section 6515 and determine whether the role of the Regents is as sentencing judge for additional punishment, or as a tribunal conducting a hearing on the merits.

There is also involved a constitutional question of considerable public importance relating to the ability of a State to impose domestic penalties for offenses committed in places where the United States has exclusive jurisdiction. In addition, a decision here may determine whether offenses under Title 2 U.S.C. sec. 192 are federal "crimes" in view of Title 18, U.S.C. sec. 402. Finally, such a decision may clarify the legal consequences of the constitutional differentiation between a Law and a Joint Resolution.

These are all matters of far-reaching importance that require this Court's intervention.

Wherefore it is respectfully submitted that the questions presented by this appeal are substantial and of public importance and the appeal in the above entitled cause comes within the proper jurisdiction of this Court.

ABRAHAM FISHBEIN,
Counsel for Appellant.

EXHIBIT "A"

COURT OF APPEALS

In the Matter of the Application of Dr. Edward K. Barsky, *Petitioner-Appellant;* for a Review under Article 78 of the Civil Practice Act, of the Determination of The Board of Regents of the University of the State of New York, Suspending Petitioner's Medical License and Permission to Practice Medicine in the State of New York for Six Months, *Respondent-Respondent*

In the Matter of the Application of Jacob Auslander, *Petitioner,*

against

The Board of Regents of the University of the State of New York, *Respondent;* Reviewing and Annulling the Determination of Respondent in Suspending the Petitioner's License to Practice Medicine in This State, as a Physician for three months (Also, Matter of Louis Miller v. Same)

Desmond, *J.:*

These are proceedings, brought, under Article 78, C. P. A., to review determinations of respondent Board of Regents, suspending for certain periods the medical licenses of petitioners Barsky and Auslander, and censuring and reprimanding petitioner Miller. In each instance the Board found authority for its action in Section 6514, subd. 2b of the Education Law, which authorizes disciplinary action against a physician who "has been convicted in a court of competent jurisdiction, either within or without this state, of a crime". The question on this appeal is as to the meaning and application of that statute.

Each of the petitioners-appellants is a physician licensed to practice in this state. All three were members of the executive board of The Joint Anti-Fascist Refugee Committee, a voluntary association which functioned during the Second World War and immediately thereafter (see the brief statement of its history and aims, in *Anti-Fascist*

Committee v. *McGrath*, 341 U. S. 123, at pp. 130, 131). All three were indicted in the United States District Court for the District of Columbia for, and all were, after a jury trial in that court, convicted of, the misdemeanor of contempt of Congress, under Title 2, Section 192, of the United States Code, in that each of them failed to obey a subpoena requiring him to produce before a Congressional Committee, the financial books and records of The Joint Anti-Fascist Refugee Committee. Each was sentenced to a fine and to imprisonment. The judgments of conviction were affirmed on appeal (*Barsky, et al.* v. *United States*, 167 Fed. 2d 241), certiorari was twice denied by the Supreme Court (334 U. S. 843; 339 U. S. 971), and each petitioner paid his fine and was imprisoned. Then followed the charges with which we deal here.

We consider that, in these records on appeal, there are no controlling facts other than those above summarized, since the voluminous testimony before the Regents as to the character and purposes of the Joint Anti-Fascist Refugee Committee, and as to the motives of these appellants, could not change the admitted fact of their conviction. From the record it is clear that each petitioner has, in fact, "been convicted in a court of competent jurisdiction * * * without this state, of a crime" (Education Law, Sec. 6514, subd. 2b). Petitioners, however, make these arguments: first, that the statutory language applied only to such offenses as are crimes under New York law, and that contempt of Congress (Section 192, Title 2, U. S. C.) is not a crime under any statute of this state; second, that the legislative intent of Section 6514, subd. 2b, is to authorize disciplinary action for such offenses only as involve moral turpitude, or are related to professional ability or conduct, and, third, that the Regents imposed unwarranted punishment, and took into account prejudicial matter in fixing the penalties.

There is nothing in Section 6514, subd. 2b, which says that, in order to serve as a predicate for action thereunder, the "crime" must be one specifically forbidden as such by a New York penal statute. Indeed, a directly opposite idea is expressed in the language: "convicted in a court of competent jurisdiction, either within or without this

state, * * *". Such language is too plain to permit construction by addition of unexpressed qualifications or exceptions (*Matter of Rathscheck*, 300 N. Y. 346, 350). Petitioners, however, argue that such decisions as *Matter of Donegan*, 282 N. Y. 285; *People ex rel. Marks* v. *Brophy*, 293 N. Y. 469; *Matter of Tonis* v. *Board of Regents*, 295 N. Y. 286, and *Matter of Garson v. Wallin*, 304 N. Y. 702, mean that the New York courts construe such statutes as Section 6514, subd. 2b, as authorizing penalties for such offenses only as are made criminal, if committed in this state, by our own laws. As to the Donegan, Marks, Tonis and Garson cases, each had to do with the imposition of stringent additional penalties, on, and solely because of, conviction of a "felony". Donegan, Marks, Tonis and Garson had each fallen afoul of a foreign statute which made certain conduct a felony which was either a misdemeanor in New York, or not cognizable at all under our domestic statutory definitions and classifications of crimes. Indeed, this court, as to Donegan (see p. 293 of 282 N. Y.) made it clear that it was not denying the Appellate Division's *discretionary* power to deal with him as one guilty of a "crime" (former Section 88, subd. 2, now Section 90, subd. 2, Judiciary Law). In the statute now before us (Education Law, Sec. 6514, subd. 2b) the Legislature has authorized disciplinary action against one convicted, not of a "felony", but of a "crime". Traditionally as well as by express statute (Penal Law, Sec. 2), the word "crime" in New York Law includes misdemeanors as well as felonies, and so it is patent that these petitioners have "been convicted, in a court of competent jurisdiction, * * * without this state, of a crime". As we remarked in *People ex rel. Marks v. Brophy, supra*, 293 N. Y. at pp. 474-5, it is the policy of our state not to decree forfeitures in our courts, if we can avoid them, for violations of the criminal laws of another jurisdiction. But public policy is made by the Legislature (see *Matter of Rhinelander*, 290 N. Y. 31, 36) and the policy of this section of the Education Law cannot be misunderstood. It does not require the imposition of any particular penalties, but leaves it to the Regents to decide on the measure of discipline, up to the extreme limit of license revocation.

We do not find it necessary to rely on an additional ground, put forward in the report of the Regents' Committee on Discipline in these proceedings for holding that petitioner's conviction in the District of Columbia was for a "crime", as that word is used in the Education Law section. The Committee on Discipline noted that New York does have, in Section 1330, Penal Law, a provision making it a misdemeanor, wilfully to refuse to produce material and proper documents before a committee of our *State Legislature*. That enactment, the Regents' Committee thought, is so similar in meaning to Section 192, Title 2, United States Code, that one violating the latter is really committing about the same offense as is made criminal by our Section 1330. Be that as it may, we construe Section 6514, subd. 2b of the Education Law as it plainly reads, that is, to authorize discipline by the Regents in the event of a conviction of a physician of a crime in any court of competent jurisdiction. Section 1330, supra, does, however, have this significance at this point: it illustrates, at least, that making a criminal offense out of a refusal to obey a legislative subpoena is in line with New York public policy, as well as that of the Federal government.

Appellants suggest that a literal construction of Section 6514, subd. 2b, will empower the Board of Regents to destroy a person, professionally, solely on a showing of the commission by him in some other state (or country) of an act which we in New York consider non-criminal, or even meritorious. Two answers are available to that: first, some reliance must be placed on the good sense and judgment of our Board of Regents, in handling any such theoretically possible cases; and, second, the offense here committed, contempt of Congress, is no mere trivial transgression of an arbitrary statute.

Turning to appellants' second main argument, we consider it impossible to read into Section 6514, subd. 2b, supra, a condition or qualification that, to justify professional discipline, the crime must be one involving moral turpitude (see, as to there being no moral turpitude in this offense, *Sinclair v. U. S.*, 279 U. S. 263, 299), or one related to the profession itself. The Legislature knows how to state such

limitations when it so desires (see, for instance, present Education Law, Section 7406, subd. 1, as to certified public accountants, and, as to physicians, compare former Public Health Law, Section 161, with present Education Law, Section 6502). Nor is this an attempt to "enforce the criminal laws of the United States" (*People* v. *Welch*, 141 N.Y. 266, 275). We are enforcing our own statute, of not uncertain meaning, which simply empowers the Regents to impose a penalty upon any physician who has been convicted of a crime in any competent court anywhere. Stringent as it is, that statute needs no cutting down, for constitutionality's sake. It is no argument against the validity of this statute that it considers a criminal conviction anywhere as a showing of unfitness, for "it is not open to doubt that the commission of crime, the violation of the penal laws of a State, has some relation to the question of character" (*Hawker* v. *New York*, 170 U.S. 189, 196). A professional license is a privilege from the state, and the state can attach to its possession conditions onerous and exacting. The special equities of individual cases can be reflected in variety of punishment, as was done here, but the choice among such varieties is for the Board, not the courts (*Matter of Sagos* v. *O'Connell*, 301 N. Y. 212).

Somewhat similar to the argument, supra, that moral turpitude must be shown, is the contention that the Regents acted arbitrarily in acting on the Federal conviction alone, without regard to the moral right or wrong of what petitioners actually did, that is, refuse to obey legislative subpoenas, and without regard to their motives. Of course, the statute itself was justification for taking the conviction as a professional fault, and the Regents, receiving voluminous testimony as to the nature of the work of the Joint Anti-Fascist Refugee Committee, and of the character and purposes of these petitioners, are presumed to have taken all those things into account in fixing the penalties.

As to the assertions, by appellants, that the Regents dealt too severely with them, or that the Regents, in deciding on punishment, ignored weighty considerations and acted on matters not proper for consideration, it is enough to say that we are wholly without jurisdiction to review such

questions (*People ex rel. Masterson* v. *French et al.*, 110 N. Y. 494, 500; *People ex rel McAleer* v. *French, et al.*, 119 N. Y. 502, 507; *People ex rel Greenbaum v. Bingham*, 201 N. Y. 343, 347; *People ex rel. Morrissey* v. *Waldo*, 212 N. Y. 174, 179; *People ex rel. Regan* v. *Enright*, 240 N. Y. 194, 198, 199; *Matter of Sagos* v. *O'Connell*, 301 N. Y. 212, 215; Benjamin, Report to the Governor on Administrative Adjudication, Vol. 1, pp. 170, 217; see *Jaffe* v. *State Board*, 135 Conn. 339, 352, 353, 354; *Williams* v. *New York*, 337 U. S. 241, 246 et seq.). *Matter of Tompkins* v. *Board of Regents*, 299, N. Y. 469, does not announce or apply any different rule as to court review of administrative discretion in measuring out discipline against physicians. In the Tompkins case, we reversed an Appellate Division order annulling a Regents' determination because the Appellate Division had exceeded its powers in so doing. Sending the whole matter back to the Regents, because of that error of law, we reminded the Board of the physician's fine record, etc., and suggested that such factors should be significant to the Board in again "exercising its broad discretion to frame the appropriate discipline, for the offense and for the offender". In that same connection, however, in Tompkins, we made it entirely clear that "the exercise of that discretion is beyond our power to review." Had we not there found an error of law (not as to punishment but as to the Appellate Division's unwarranted annulment order) we could not, in the Tompkins case, have done other than affirm. In the present case there is no error of law, and so no basis for any interference by us.

The orders should be affirmed.

OPINION TO REVERSE

FULD, *J.* (dissenting):

It is "the public policy of this State that we do not, if we can avoid it, decree forfeitures in our courts because of violations of the criminal laws of another jurisdiction." (People ex rel. Marks v. Brophy, 293 N. Y. 469, 474.) That public policy is grounded in a natural and humane abhor-

rence of heaping added domestic penalties upon one convicted of a crime in a foreign jurisdiction. I cannot, therefore, agree with the court's conclusion that the license of a physician may be suspended or revoked by the Regents—pursuant to section 6514, subdivision 2(b), of the Education Law—because of a conviction of a crime "without the state," when the underlying act is not of a character recognized as criminal by the laws of this state, when it has been held by the courts of the convicting jurisdiction not to involve moral turpitude and when there is no evidence reflecting adversely on the licensee's qualifications to practice his profession.

Appellant Barsky and a number of others, all members of the Executive Board of the Joint Anti-Fascist Refugee Committee, were convicted under title 2, section 192, of the United States Code, of the misdemeanor of contempt of Congress, for failing to produce records of the organization, pursuant to a subpoena of a Congressional Committee conducting an investigation. The conviction was affirmed—one judge dissenting—by the United States Court of Appeals for the District of Columbia (*Barsky* v. *United States*, 167 F (2d) 241); a petition for a writ of certiorari was denied by the United States Supreme Court in June, 1948 (334 U.S. 843) and a petition for rehearing was denied two years later, with a notation that two of the justices were of the opinion that the petition should be granted (339 U.S. 971). Barsky served a term of five months in prison.

The Regents' Committee on Discipline—here comprised of two lawyers and a physician—is the body set up by statute to conduct hearings for the Board of Regents (Education Law, Sec. 211; Sec. 6514, subd. 4; Sec. 6517). It summarized "the issues litigated and not litigated at the criminal trial" in this way: "There was no adjudication with respect to the actual facts regarding the Refugee Committee and its operations. There was no adjudication with respect to the motives or reasons of the defendants in failing to comply with the subpoenas. There was adjudication that the constitutional challenges and the defense of lack of custody or control of the records were legally insufficient."

The Committee on Discipline noted further that the federal court had directed judgment of acquittal on a conspiracy count in the indictment.

With regard to the reasons given by Barsky and the other members of the Refugee Committee for withholding records called for by the subpoena, the Regents' Committee on Discipline wrote as follows:

> "They had been advised by counsel that the subpoenas were invalid. * * * They asserted that * * * (none) of their activities fell within the scope of the matters into which * * * the Congressional Committee was authorized to inquire. These facts, they asserted, could be ascertained by examination of the reports which the Refugee Committee had filed with the President's War Relief Control Board. With regard to the scope of the Congressional Committee's authority, they referred further to a statement of the Congressional Committee as to its 'regular duty of collecting information on the operations and activities of fund-raising organizations in this country, whose purpose is in part to conduct activities abroad", and denied that this was among the subjects committed to the Congressional Committee by the House of Representatives. They expressed a fear that to make public some of the information contained in their records, specifically the names of Spanish Republican exiles who participated in the Refugee Committee's activities or who were the beneficiaries of its relief, would endanger the lives of the families of those persons still in Spain. Based in part on a newspaper statement emanating from the Congressional Committee to the effect that its Chief Counsel had on December 1, 1945 (before the subpoenas were issued), asked the President's War Relief Control Board to cancel the Refugee Committee's license, they asserted that the Congressional Committee had evidenced hostility and prejudgment. Finally, they asserted that they were challenging the authority of the Congressional Committee and the validity of its subpoenas so that those questions might if necessary be determined [illegible] the courts.

"If these views were honestly held and these assertions honestly made, they would sufficiently explain the refusal by Respondent and the others to produce the subpoenaed records, that being the only method by which the legal objections to the Congressional Committee's course could be judicially determined, and the traditional method by which such legal questions are raised (*Sinclair* v. *United States, supra* (279 U. S. 263)). The question is, then, whether there is any basis in the record for concluding that these views and assertions were not honestly held and made. Our examination of the record discloses no such basis."

And, commenting on the crime of which appellant was later convicted, the Regents' Committee found that "no moral turpitude" was involved. (See *Sinclair* v. *United States*, 279 U. S. 263, 299.)

Those findings are not here questioned; actually, they rest, in large part, on concessions of the Attorney General at the hearing before the Medical Grievance Committee.[1] Thus, he conceded that appellant was advised by counsel that "the subpoenas were unconstitutionally issued and that he was not legally required to respond to them"; that that opinion at that time was not "an unreasonable construction of law"; and that the same opinion "was held by many lawyers and some jurists"—indeed, by one of the federal Court of Appeals judges who heard the criminal appeal. In essence, then, the gist of the findings by the Committee on Discipline appears to be this: that the crime of which appellant was convicted did not, as the Supreme Court unequivocally stated, involve moral turpitude (see *Sinclair* v. *United States, supra*, 279 U. S. 263, 299), and that the record was barren of evidence reflecting on appellant as a man or a citizen, much less on his professional capacity or his past or anticipated conduct toward his patients.

[1] It should be noted that, when the parties were before the Regents' Committee on Discipline, counsel stipulated that that Committee should consider and take into account matter not in the record of the hearing before the Medical Grievance Committee, including specifically the record of the criminal case in the federal court.

Upon such facts, it should require exceedingly plain language to cause a court to conclude that the legislature has authorized appellant's suspension from practice for six months or, indeed, as the court implies, the revocation of his license.

The court chooses to find such language in that portion of the section of the Education Law which authorizes disciplinary action against a physician who "has been convicted in a court of competent jurisdiction, either within or without the state, of a crime." It is urged that this language "is too plain to permit construction by addition of unexpressed qualifications or exceptions" (Opinion, p. 2). In that I cannot concur. Experience has taught that sheer literalism is more often than not a poor guide to meaning and that a judge must go beyond and outside the dictionary to ascertain the legislative purpose and design. This is especially so here, for reasons which we have discussed at length in analogous cases. (See, e. g., *People ex rel. Marks* v. *Brophy, supra,* 293 N. Y. 469; *Matter of Donegan,* 282 N. Y. 285; see, also *Matter of Garsson* v. *Wallin,* 304 N. Y. 702.) Thus, in *Matter of Donegan* (*supra,* 282 N. Y. 285, 292), we said that discipline "partakes of the nature of punishment," with the consequence that statutes imposing discipline "must be strictly construed," and, in the *Marks* case (*supra,* 293 N. Y. 469, 474), we declared, to "decree forfeitures * * * because of violations of the criminal laws of another jurisdiction," is contrary to the established "public policy of this State".

For my own part, I cannot divine in the words of subdivision 2(b) of section 6514 any legislative instruction to apply them broadly and remorselessly. On the contrary, I find nothing to indicate that the legislature had any desire to change a policy which has been so often declared and so uniformly adhered to. There is nothing new in the words "convicted * * * without this state"; the *Marks* case (*supra,* 293 N. Y. 269) dealt with virtually identical language and the *Donegan* case (*supra,* 282 N. Y. 285) dealt with language equally broad. In the former case, this court, after noting that the question for decision was the meaning of the language contained in a commutation agree-

ment—*conviction of "a felony, 'either in New York State or any other state' "*—declared (293 N. Y., at p. 474):

> The Atkins case (248 N. Y. 46, supra), held that when the Governor of this State in 1914 decreed that a released prisoner should forfeit his commutation if convicted of 'any felony,' the Governor referred only to a conviction of a crime described in our laws as a felony. We think the Governor who in 1935 ordered that this realtor should suffer a similar forfeiture if convicted of 'a felony, either in New York State or any other state' meant the same thing."

Those cases make it abundantly clear that the mere fact of conviction in another jurisdiction is not enough to warrant the imposition of an additional penalty in this state. It must be a particular kind of conviction.

"Felony," as a term of art, still retains much of its character as an infamous crime and it is universally used in American law to distinguish those breaches of the law which are of a more serious character. Despite that, we held that, when the legislators (*Matter of Donegan, supra*, 282 N. Y. 285) or the governor (*People ex rel. Marks* v. *Brophy, supra*, 293 N. Y. 469) used the word "felony", they meant only such acts as would be deemed a felony in New York. *Matter of Donegan, supra*, 282 N. Y. 285, is illustrative; we were there required to construe the sections of the Judiciary Law (Sec. 88, subds. 3, 4; sec. 477; now numbered sec. 90, subds. 4, 5) providing for disbarment of an attorney convicted of a felony under the federal law (old sec. 88, subd. 4; present sec. 90, subd. 5) as well as under our law. Donegan had been convicted of a conspiracy to commit a mail fraud, a felony under the federal law. It could logically and reasonably be presumed that our legislature, when it required disbarment for conviction of a federal "felony," considered that all crimes classified as felonies by the federal law were of a sufficiently serious character to require such disbarment. Nevertheless, we held that even in that case we would not ascribe such an intention to the legislature in view of the established policy against forfeiture for viola-

tions of the laws of another jurisdiction and in view of the requirement that the statute be strictly construed.

So, here, where the legislature has declared that it must be a conviction of a "crime," the same rules of policy and construction call upon us to hold that only acts which are criminal under our laws are included. Indeed, if any distinction is to be drawn between the two types of cases—that involving "felony" and the one before us involving "crime"—the argument is far stronger for limiting the term "crime" than it is for limiting the term "felony." In enacting the provision under consideration, it is, of course, obvious that the legislature did not canvass all of the myriad "crimes" in the other forty-seven states or under the federal law or under the laws of foreign countries—undoubtedly included in the statute's "without the state," if sheer literalism is the guide—and reach the conclusion that each of those crimes warranted an administrative board in depriving a doctor of his license. Instances may readily be cited of acts—and I cull from the court's opinion (p. 4)—"in some other state (or country) * * * which we in New York consider non-criminal, or even meritorious."[2]

It seems almost incredible to me that the legislature could have contemplated that such "non-criminal" or "meritorious" acts should be the predicate for a consequence so harsh as revocation or suspension of a physician's right to practice. Yet that is precisely what the court is now holding. It is no answer to say, as the court does—when it is

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[2] The Regents' Committee on Discipline, for instance, called attention to the fact that, whereas our Domestic Relations Law (sec. 5) permits marriage between first cousins, the State of Arkansas stamps it a crime (Ark. Stats. (1947) Sec. 55-103, Sec. 41-811, and see *Nations* v. *State*, 64 Ark. 467). I mention but two other instances. In a number of states, it is a violation of so-called segregation laws and a crime for a Negro passenger to refuse to occupy his assigned seat in a segregated section of a public bus. (See, e. g., Ala. Code (1940) tit. 48, sec. 301 (31a); La. S.A.-C.C. (1950) Art. 45, Sec. 195; N.C. Gen. Stat. (1950) Sec. 62-121.71-72, and see *State* v. *Johnson*, 229 N.C. 701; S.C. Code (1952) Sec. 58-1496; Texas Pen. Code, Art. 1659; Code of Va. (1948) Sec. 56-329, and see *New* v. *Atlantic Greyhound Corp.*, 186 Va. 726). And, in Kansas, it is a crime to sell or even to drink alcoholic liquor in a public place. (Kansas Gen. Stat. (1949) ch. 41-719, 803, and see *State* v. *Shackle*, 29 Kans. 341.)

pointed out that such "a literal construction * * * will empower the Board of Regents to destroy a person" without the slightest warrant—that "some reliance must be placed on the good sense and judgment of our Board of Regents, in handling any such theoretically possible cases" (Opinion, p. 4). That may well be so, and it is also true that the Board did not here disbar the licensee or revoke his license, but the fact is, as we wrote in *Packer Collegiate Inst.* v. *University of State of N. Y.*, 298 N. Y. 184, 190, a "statute's validity must be judged not by what has been done under it but 'by what is possible under it.'" And even formal censure, the minimum discipline that the statute prescribes, may itself be extremely damaging to a physician's career.

As a matter of statutory construction alone, without considering whether such legislation may be constitutionally enacted, we should not attribute to the legislature a design so palpably harsh and extreme. (See *Matter of Rouss*, 221 N. Y. 81, 91, where the court declared, "Consequences cannot alter statutes, but may help to fix their meaning.") While affirmance herein may affect only appellant, the present decision has an importance that transcends and reaches far beyond this case. And that—its impact over the years—is what so deeply concerns and troubles me. As I have sought to show, the only reasonable construction—and the one required by our precedents—is that only those acts, recognized by the laws of this state as criminal in nature, are encompassed by the statute before us.

In point of fact, the Regents' Committee on Discipline suggested that the charge against appellant might be sustained upon the ground that the federal crime of which he was convicted finds its analogue in section 1130 of our Penal Law—which provides that one who willfully refuses to produce documents before the state legislature or one of its committees, is guilty of a misdemeanor. The court has found it unnecessary—in the view that it has here taken—to consider that possibility, and, that being so, I see little to be gained by discussion of the matter.

However, at least one other question remains for decision.

After noting that the courts would ultimately have to decide whether appellant's crime was one contemplated by

the statute, the Regents' Committee turned to the subject of discipline and wrote that there was no basis in the facts presented for any punishment greater than censure and reprimand:

> "While the Board of Regents is vested with wide discretion as to the measure of discipline on the facts of a particular disciplinary proceeding, the imposition in any instance of discipline beyond the statutory minimum of censure and reprimand must, we believe, be based either on the inherent nature of the respondent's violation of the disciplinary statute or on an evidentiary showing that the respondent's conduct justifies more than the minimum discipline."

And it ended its report in this way:

> "Since violation of the Federal statute which * * * (appellant) has been convicted of violating involves inherently no moral turpitude, and since there has been no impeachment by evidence of * * * (appellant's) explanation (sufficient if unimpeached) of his failure to produce the subpoenaed documents, we find in the record no valid basis for discipline beyond the statutory minimum of censure and reprimand; and we therefore recommended that * * * (appellant's) license be not suspended, as the Medical Committee on Grievances has recommended, but that he be censured and reprimanded."

The Board of Regents, however, disregarded that recommendation. Instead, giving no reason whatsoever for its action, it confirmed the recommendation of the Medical Committee on Grievances—made, it must be remarked, on a record less complete than the one before the Committee on Discipline.[3]

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[3] While it is impossible to say what prompted the Regents' acceptance of the Medical Grievance Committee's recommendation that appellant's license be suspended for six months, it may be of some significance that, among the findings made by the Grievance Committee, and confirmed by the Regents, was the finding that "Ever since 1947, the Committee (Anti-Fascist Refugee Committee) has been listed as subversive by the Attorney-

This court has heretofore declined, in most instances, to consider the measure of discipline imposed by an administrative agency. (But cf. *Matter of Tompkins* v. *Board of Regents*, 299 N. Y. 469, 476–477.) That is a subject, we have concluded, that rests in the discretion of the agency. However, there is no more reason here, than with other discretionary matters, why some limit should not be imposed on the exercise of discretion, and judicial review sanctioned, where that exercise is unsupportable on rational grounds and becomes arbitrary and capricious. If the statutory authority of the Regents is, in truth, as the court here holds,[4] so broad, so unrestrained, then, I venture, the statute transcends constitutional limits.

It is not without relevance to observe that, in the process of time, practically every calling necessitating skill has been subjected in some measure to the requirements of a license. The lawyer and the physician have been followed by the dentist, the teacher, the barber, the plumber and many others. It may not be long before the list embraces the butcher and the baker. To what extent the public interest requires protection from incompetent or dishonest practitioners of medicine or of plumbing is, of course, for the legislature to decide. But there can be no gainsaying the fact that the legislature advances into the frontiers of the individual's constitutional right to liberty and property, when it undertakes to deprive a man of his practice or trade for reasons unconnected with its proper exercise. (Cf. *Bartos* v. *United States District Court*, 19 F. (2d) 722.)

In sum, then, the court's construction of the Education Law provision, particularly when taken with its grant to

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General of the United States." Reliance upon that fact, was, of course, improper, for, as the Committee on Discipline pointed out, that listing was entitled to no weight whatsoever in the present proceeding, and its utilization constituted gross and prejudicial error. (See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123.)

[4] In the course of its opinion, the court has written (Opinion p. 6):

"As to the assertions, by appellants, that the Regents *dealt too severely with them*, or that the Regents, in deciding on punishment, *ignored weighty considerations and acted on matters not proper for consideration*, it is enough to say that we are wholly without jurisdiction to review such questions." (Emphasis supplied.)

the Board of Regents of uncontrolled discretion, not only as to the matters on which they may rely in reaching a determination but also as to the measure of discipline, places the statutory scheme beyond the bounds of what is permitted to the legislature. To me, it seems not merely delegation run riot but legislative abdication. A legislature may not require that physicians, as a condition of their practice, live under the constant fear that they may be deprived of their right to practice if they offend against *any* law, *any* place. To be sure, as the court remarks, something may—and I assume must—be left to "the good sense and judgment" of the Regents, but, while "good sense and judgment" are essential qualities for members of an administrative board, they certainly do not furnish any guide or standard for administrative action. The fact that "crime" has been committed *somewhere* is too vague, too capricious, too unrelated to anything that a citizen of our state is entitled to have considered, to be regarded as a standard for any legislation, much less for legislation that is said to authorize a penalty that may destroy a person professionally, that may result in the loss "of all that makes life worth living". (*Ng Fung Ho* v. *White*, 259 U. S. 276, 284). Such delegation, uncontrolled, in my judgment, as it is, violates first principles. In *Matter of Small* v. *Moss*, 279 N. Y. 288, 299, we declared that "The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field. Without the second rule as a corollary to the first rule there would be no effective restraint upon unfair discrimination or other arbitrary action by the administrative officer," and in *Packer Collegiate Inst.* v. *University of State of N. Y.*, *supra*, 298, N. Y. 184, 189, after quoting that passage, we stated that "there must be a clearly delimited field of action and, also, standards for action therein." (See, also, *Niemotko* v. *Maryland*, 340 U. S. 268, 273; *Matter of Fink* v. *Cole*, 302 N. Y. 216, 225.) The wisdom of that constitutional safeguard is highlighted by its disregard in this case.

For his federal offense, appellant has served a jail sentence. Unless the nature of the criminal statute or the circumstances of its infraction or some other evidentiary

fact casts doubt upon his character or upon his past or anticipated conduct as a physician, his further suspension from practice is truly an additional penalty for that single offense, rather than the regulation of medical practice in the public interest. (Cf. *Ex parte Garland*, 4 Wall, (U. S.) 333, 377.) The facts found by the Regents' Committee on Discipline, not challenged either by the Regents or by this Court, prevent any other conclusion.

I would reverse.

* * * * * *

Others affirmed, opinion by Desmond, J., in which all concur except Fuld, J., who dissents in an opinion.

EXHIBIT "B"

In the Matter of Edward K. Barsky, *Petitioner, against* Board of Regents of the University of the State of New York, *Respondent*

This is a review pursuant to article 78 of the Civil Practice Act suspending petitioner's license for a period of six months. Petitioner is a duly licensed physician. He was charged by the Committee on Grievances of the Department of Education of the State of New York with having been convicted of a crime in a court of competent jurisdiction within the meaning and purview of paragraph (b) of subdivision 2 of section 6514 of the Education Law, in that petitioner had been convicted in the United States District Court for the District of Columbia of a violation of section 192 of title 2 of the United States Code, commonly known as contempt of Congress. The questions presented on this review are the identical questions passed upon by this court in *Matter of Auslander* (279 App. Div. 447). On the authority of the former case, determination of the Board of Regents unanimously confirmed, without costs. Present—Foster, P. J., Heffernan, Brewster, Bergen and Coon, JJ.

EXHIBIT "C"

In the Matter of LOUIS MILLER, *Petitioner, against* BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, *Respondent*

In the Matter of JACOB AUSLANDER, *Petitioner, against* BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, *Respondent*

COON, J. The petitioners are doctors. They were convicted in the District Court of the United States for the District of Columbia for contempt of Congress for the refusal to produce certain records before a Congressional committee. That offense is a misdemeanor, therefore a crime (U. S. Code, tit. 2, § 192.) Their conviction was affirmed by the Court of Appeals for the District of Columbia (*Barsky* v. *United States,* 167 F. 2d 241), and certiorari was twice denied by the Supreme Court. (334 U. S. 843, petition for rehearing denied 339 U. S. 971.)

Subsequently the Board of Regents of the State of New York made a determination as to each petitioner in disciplinary proceedings, which this proceeding under article 78 of the Civil Practice Act, seeks to annul. The Board of Regents acted under paragraph (b) of subdivision 2 of section 6514 of the Education Law, which authorizes discretionary disciplinary action against a licensed doctor who "has been convicted in a court of competent jurisdiction, either within or without this state, of a crime."

Petitioners would interpret this language to mean that the "crime", wherever committed, must be one constituting a crime within the purview of the laws of the State of New York. They urge that there is no such crime as contempt of Congress in this State. Petitioners rely principally upon *Matter of Donegan* (282 N. Y. 285), and *People ex rel. Marks* v. *Brophy* (293 N. Y. 469). Both of these cases involved mandatory punitive action, not discretionary; and neither involved the statute which we are considering here.

When the Legislature used the words "within or without this state," it presumably meant what it said. There is no ambiguity in that language. Had the Legislature meant a

rime "without the state" which would constitute a crime ithin this State, it would have said so, as it has in other nstances. (Education Law, § 6502.)

Petitioners also urge that the crime of which they were onvicted bears no relation to the practice of medicine, and nvolves no moral turpitude. The conviction for any crime ears some relation to the practice of any profession, and noral turpitude depends upon a point of view and existing ircumstances. Presumably, and by its language, the Legisature intended the Board of Regents to determine those uestions and exercise its discretion.

The legal history of the trial, conviction and appeals conclusively establishes that petitioners were convicted by a "court of competent jurisdiction," and we think the Board of Regents acted within its lawful authority in making these determinations.

The determination in each case should be confirmed. FOSTER, P.J., HEFFERNAN, BREWSTER and BERGAN, J.J., concur.

Determination in each case confirmed, without costs.

EXHIBIT "D"

NEW YORK STATE EDUCATION LAW

Section 6514. Revocation of certificates; annulment of registrations.

1. Whenever any practitioner of medicine, osteopathy or physiotherapy shall be convicted of a felony, as defined in section sixty five hundred two of this article, the registration of the person so convicted may be annulled and his license revoked by the department. It shall be the duty of the clerk of the court wherein such conviction takes place to transmit a certificate of such conviction to the department. Upon reversal of such judgment by a court having jurisdiction, the department, upon receipt of a certified copy of such judgment or order of reversal, shall vacate its order of revocation or annulment.

2. The license or registration of a practitioner of medicine may be revoked, suspended or annulled or such practi-

tioner reprimanded or disciplined in accordance with the provisions and procedure of this article upon decision after due hearing in any of the following cases:

(a) That a physician is guilty of fraud or deceit in the practice of medicine or in his admission to the practice of medicine; or

(b) That a physician has been convicted in a court of competent jurisdiction either within or without this state, of a crime; or

(c) That a physician is an habitual drunkard, or is or has been addicted to the use of morphine, cocaine or other drugs having similar effect, or has become insane; or

(d) That a physician offered, undertook or agreed to cure or treat disease by a secret method, procedure, treatment or medicine or that he can treat, operate and prescribe for any human condition by a method, means or procedure which he refuses to divulge upon demand to the committee on grievances; or that he has advertised for patronage by means of handbills, posters, circulars, letters, stereopticon slides, motion pictures, radio, or magazines; or

(e) That a physician did undertake or engage in any manner or by any ways or means whatsoever to perform any criminal abortion or to procure the performance of the same by another or to violate section eleven hundred and forty-two of the penal law, or did give information as to where or by whom such a criminal abortion might be performed or procured.

(f) That a physician has directly or indirectly requested, received or participated in the division, transference, assignment, rebate, splitting or refunding of a fee for, or has directly or indirectly requested, received or profited by means of a credit or other valuable consideration as a commission, discount or gratuity in connection with the furnishing of medical, surgical or dental care, diagnosis or treatment or service, including x-ray examination and treatment, or for or in connection with the sale, rental, supplying or furnishing of clinical laboratory services or supplies, x-ray laboratory services or supplies, inhalation therapy service or equipment, ambulance service, hospital or medical supplies, physiotherapy or other therapeutic service or equip-

ment, artificial limbs, teeth or eyes, orthopedic or surgical appliances or supplies, optical appliances, supplies or equipment, devices for aid of hearing, drugs, medication or medical supplies or any other goods, services or supplies prescribed for medical diagnosis, care or treatment under this chapter, except payment, not to exceed thirty-three and one-third per centum of any fee received for x-ray examination, diagnosis or treatment, to any hospital furnishing facilities for such examination, diagnosis or treatment. Nothing contained in this chapter shall prohibit physicians from practicing medicine as partners nor in groups nor from pooling fees and monies received, either by the partnerships or groups or by the individual members thereof, for professional services furnished by any individual physician, member, or employee of such partnerships or groups, nor shall the physicians constituting the partnerships or groups be prohibited from sharing, dividing or apportioning the fees and monies received by them or by the partnership or group in accordance with a partnership or other agreement; provided that a certificate of doing business under an assumed name shall have been filed pursuant to section four hundred forty or four hundred forty-b of the penal law, and provided further that no such practice as partners or in groups or pooling of fees or monies received or sharing, division or apportionment of fees shall be permitted with respect to medical care and treatment under the workmen's compensation law except as expressly authorized by the workmen's compensation law. (Officially certified transcript printed in McKinney's Consolidated Laws of New York Volume 16, Part 2, at page 292).

Section 6515. Procedure in disciplinary proceedings.

1. The committee on grievances shall be continued. Such committee shall consist of ten members who shall be appointed by the regents. The term of office of each of such members of such committee shall be five years. The terms of office of two members shall expire each year. In the case of vacancy at any time by resignation, death or otherwise in the membership of the committee, such vacancy shall be filled for the unexpired term in the same manner as provided for in the original selection of such member.

2. Any duly incorporated state medical or osteopathic society having two hundred or more members may nominate candidates for members of such committee, not to exceed three nominations for each member of such committee to which such society shall be entitled hereunder. When the candidates are so nominated the regents shall appoint for the terms specified herein as they shall determine, such members of such committee, so that such committee shall consist of four members who have been duly nominated by the Medical Society of the State of New York, two members by the New York State Homeopathic Society, one member by the New York State Osteopatic Society, and the regents upon their own nomination shall appoint three members of conspicuous professional standing. Each member of such committee shall be a duly licensed physician of this state.

3. The members of such committee shall serve without compensation and shall annually, within ten days after the first day of January of each year, organize by the election of a chairman and a secretary.

4. The members of such committee shall have jurisdiction to hear all charges against duly licensed physicians, osteopaths and physiotherapists of this state for violation of the provisions of section sixty-five hundred fourteen hereof, except subdivision one, and upon such hearing such committee shall determine such charges upon their merits, and the department may, after due notice and hearing, upon the receipt from such committee of the record, findings and determination of such committee wherein and whereby such practitioner has been found guilty, revoke and annul his license, annul his registration, suspend him from practice, or reprimand or otherwise discipline him. Proceedings against any practitioner under this section shall be begun by filing a written charge or charges against the accused. Such charges may be preferred by any person, corporation or public officer, and they shall be filed with the secretary of the committee on grievances and such secretary shall forward to the executive officer of the department a copy of such charges in all cases in which such committee or a subcommittee thereof shall deem a trial necessary. The chairman of such committee, when charges are preferred, may designate three or more of the members of such com-

mittee, including, whenever possible, at least one member who represents the same school of practice as the physician, osteopath or physiotherapist, against whom the charges are preferred to hear and report upon such charges to such committee. The time and place of the hearing of such charges shall be fixed by the secretary of the committee as soon as convenient and a copy of the charges, together with a notice of the time and place when they will be heard shall be served upon the accused or his counsel at least ten days before the date actually fixed for such hearing. Where personal service or service upon counsel after due diligence cannot be effected and such fact is certified on oath by any person duly authorized to make legal service, the secretary of the committee shall cause to be published for four times at least thirty days prior to the hearing, a notice of the hearing in a newspaper published in the county in which the physician, osteopath or physiotherapist was last known to practice, and a copy of such notice shall also be mailed to the accused at his last known address. All such notices of hearing of charges shall contain a plain and concise statement of the material facts without unnecessary repetition, but not the evidence by which the charges are to be proved with a notification that a stenographic record of such proceedings will be kept, and that the accused will have opportunity to appear either personally or by counsel at the hearing, with the right to produce witnesses and evidence upon his own behalf, to cross-examine such witnesses, to examine such evidence as may be produced against him and to have subpoenas issued by the committee. Such subcommittee to whom such charges were referred shall make a written report of findings and recommendations and the same shall be forthwith transmitted to the secretary of the committee on grievances, with a transcript of the evidence. Said grievance committee may thereupon act upon such recommendation as it shall deem fit, or may take further testimony if the same shall seem desirable in the interest of justice. Thereupon the committee shall determine such charges upon their merits (the vote of each member of such committee to be recorded as part of the committee's findings). If by unanimous vote the practitioner is found guilty of such charges or any of them, the committee shall transmit

to the department the record, findings and determination wherein and whereby such practitioner has been found guilty, and their recommendation, and the regents after due hearing shall in their discretion execute an order accepting or modifying such determination of the committee as hereinabove provided. If the practitioner is found not guilty, the committee shall order a dismissal of the charges, and the exoneration of the accused.

Nothing herein contained shall estop the department from initiating proceedings in any case.

5. Any licensed practitioner found guilty under the provisions of this section, or whose license is otherwise revoked or suspended or registration annulled, or who has been refused registration, or who is otherwise reprimanded or disciplined under this article may institute a proceeding under article seventy-eight of the civil practice act for the purpose of reviewing such determination returnable before the appellate division of the third judicial department, but no such determination shall be stayed or enjoined except upon application to such appellate division, after notice to the attorney-general. The committee on grievances or any member thereof may issue subpoenas and administer oaths pursuant to section sixty-one of the public officers law in connection with any hearing or investigation under this article and it shall be the duty of such committee to issue subpoenas at the request of and upon behalf of the defense. The committee on grievances shall not be bound by the laws of evidence in the conduct of its proceedings but the determination shall be founded upon sufficient legal evidence to sustain the same. The department shall furnish legal advice and assistance to the committee whenever such service is requested.

6. Any controversy between two or more physicians, osteopaths or physiotherapists, or between one or more physicians, osteopaths or physiotheapists and another person, which such parties to such controversy agree to submit to arbitration, may be submitted in writing to the committee on grievances, which may in its discretion, act as arbitrator in such controversy, and the decision of the committee upon such arbitration shall be final, and where the same orders the payment of a sum of money, the same may be

docketed as a judgment of a court of record and enforced as such judgment, provided the terms of the arbitration include such provision.

7. The regents may remove any member of such committee from office who shall have been found guilty, after due hearing, of malfeasance in office or neglect of duty.

8. No member of the committee shall participate in any way in the hearing or determination of any charges in which he may be either a witness as to facts or an accused, nor in any case where the parties, complainant or accused, are related to him by consanguinity or affinity within the sixth degree. The degree shall be ascertained by ascending from the member of the committee to the common ancestor and descending to the party, counting a degree for each person in both lines, including the member of the committee and the party and excluding the common ancestor.

9. Should, for any reason, three or more members of the committee be disqualified from participating in the hearing and decision of any case, or be for other reasons unable to participate therein their places may be temporarily filled for the purpose of determining the case to be heard by the remaining members of the committee nominating twice the number of candidates for such vacancy from whom there shall be selected by the chairman of the committee, after notice to the respective parties, the necessary number of members to constitute a quorum. A quorum of the committee shall consist of six members.

10. Such committee shall have power to make such rules and regulations for the conduct of its business as it shall deem necessary, provided such rules and regulations do not conflict with any of the provisions of this article.

11. The committee shall have power, where a proceeding has been dismissed, either on the merits or otherwise, to relieve the accused from any possible odium that may attach by reason of the making of charges against him, by such public exoneration as it shall see fit to make if requested by the accused so to do. (Officially certified transcript printed in McKinney's Consolidated Laws of New York Volume 16, Part 2 at page 298).